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38

REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION,

September Term, 1894;

FOR THE

MIDDLE DIVISION,

December Term, 1894;

AND FOR THE

WESTERN DIVISION,

April Term, 1895.

GEORGE W. PICKLE,

ATTORNEY-GENERAL AND REPORTER.

VOLUME X.

NASHVILLE, TENN.:
MARSHALL & BRUCE CO., STATIONERS AND PRINTERS.
1895.

ERRATA.

1. The sixth line of the second head note on page 624 should read "filed by a clerk *of* the assignee" instead of "filed by a clerk, the assignee."

2. There should be added to the fifth head note on page 603 the words, "where the insolvency occurs after the stockholder's death."

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Webb *v.* Railway Co.	88 Tenn., 128	388
Wells *v.* Mosely	4 Cold., 402	222
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Wheeler, Read *v.*	2 Yer., 55	460
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1894.

KELLEY BROTHERS *v.* FLETCHER.

(*Knoxville.* October 17, 1894.)

1. SUPREME COURT. *Bill of exceptions essential, when.*

Unless made part of record by bill of exceptions, evidence excluded by the Chancellor on the hearing cannot be looked to by this Court. (*Post*, *p.* 5.)

Cases cited and approved: Perry *v.* Pearson, 1 Hum., 431; Spurlock *v.* Fulks. 1 Swan, 291; Aymett *v.* Butler, 8 Lea. 453; Steele *v.* Frierson, 85 Tenn., 438; Anderson *v.* Railroad, 91 Tenn., 54.

2. CORPORATIONS. *Stockholders' liability for subscriptions.*

Where a corporation, pursuant to legal authority, issues paid-up non-assessable shares in payment for property or services, it is presumed that the transaction was made in good faith, and the property or services placed at a fair valuation; and creditors

of the corporation seeking, after its insolvency, to compel the holders of such shares to contribute to payment of debts of the corporation must aver and prove that the transaction was fraudulent, and should not therefore operate as payment in full for such shares. (*Post, pp. 7–16.*)

Cases cited: Merriman *v.* Lacefield, 4 Heis., 217; Austin *v.* Ramsey, 3 Tenn. Ch., 121; 5 Dillon, 50; 119 U. S., 345; 110 Ind., 417; 31 N. E. Rep., 362; 59 Md., 1; 78 Wis., 427 (S. C., 23 Am. St. R., 419, 421); 92 Ala., 407 (S. C., 25 Am. St. R., 82, 83); 146 U. S., 642.

4. SAME. *Payment of stock subscriptions in property.*

Doctrine reaffirmed that stock subscriptions may be paid in such property as the corporation may be authorized to buy or use, and that such payment, made in good faith and at a fair valuation, is as valid and effectual as if made in cash. (*Post, pp. 6, 7.*)

Cases cited: Searight *v.* Payne, 6 Lea, 284; Albitztigui *v.* Guadalupe, etc., Mining Co., 92 Tenn., 605; 119 U. S., 343; 110 Ind., 417; 35 N. J. Eq., 501.

FROM KNOX.

Appeal from Chancery Court of Knox County. HENRY R. GIBSON, Ch.

TAYLOR & PEPPER for Complainants.

J. W. CALDWELL, GREEN & SHIELDS, LUCKEY & SANFORD, TEMPLETON & CATES, WELCKER & GAUT, and A. G. HOWE for Defendants.

CALDWELL, J. The Hercules Marble Company was chartered under the laws of West Virginia, and

had its principal business office at Knoxville, Tennessee. In February, 1891, T. W. Keller and others, creditors and shareholders, filed their bill against said corporation and others, alleging its insolvency, and seeking to have its affairs settled and wound up under the decrees of the Chancery Court at Knoxville. In due time a receiver was appointed and placed in possession of the assets of the company.

Thereafter, on August 8, 1891, J. J. and J. M. Kelley, composing the firm of Kelly Brothers, by permission expressly granted in that cause, filed the present bill, in behalf of themselves and other creditors, against numerous holders of stock of said company. This bill was filed in aid of that one, and its purpose was to compel the present stockholders to contribute *pro rata* an aggregate sum sufficient in amount to satisfy such balance of the liabilities of the corporation as might remain unpaid after the exhaustion of the assets in the hands of the receiver.

The material substance of the particular allegations upon which this relief was sought, briefly stated, is: That not more than ten per cent. of the stock subscription of the Hercules Marble Company was ever in fact paid, though the certificates of stock appear, upon their faces, to be fully paid up and non-assessable; and that the present holders knew, or should have known, that they were not fully paid up, from the fact that they respectively acquired their stock at merely nominal prices.

Keiley Brothers v. Fletcher.

Two of the defendants almost conceded the right of the complainants to the relief sought, while the others (who are numerous) vigorously resisted the bill. Some of those resisting averred that the subscription to stock was in fact paid in full, as indicated on the face of the certificates; and these joined others in further averring that they purchased their respective certificates upon the open market, at the market price, and in the full belief that they were in fact what they purported to be.

It was developed in the proof, that the Hercules Marble Company was chartered on April 13, 1888, with a subscribed capital stock of $50,000 only; but with the express privilege of increasing the same to $100,000; that, in pursuance of that privilege, on May 22, 1888, the capital stock was fixed at $100,000, the number of shares being 10,000, at the par value of $10.00 each.

It was further developed, that 9,950 of said shares, of the par value of $99,950, were, by direction of the board of directors, regularly issued to T. L. Lambie, in consideration of his assignment to the corporation of certain leases of stone and marble lands; and that certificates for the whole $100,000 of stock were, by direction, issued, with the recitation upon their faces that they were full-paid and non-assessable.

It appeared also in the proof, that, after the issuance of the stock, Lambie transferred to the company different blocks of his stock, amounting, in the

aggregate, to about $55,000, and that, thereafter, the corporation sold the same for its own benefit, part at the rate of twelve and one half cents and part at the rate of twenty-five cents on the dollar; and that much of the stock retained by Lambie, and much of that transferred by him to the corporation, and by it sold, is now owned by the defendants in this case.

Proof was also introduced tending to show that the leases assigned by Lambie to the corporation, in payment of his subscription to stock, were in fact of but little value. On motion of the defendants, all the latter proof was rejected, because not responsive to any issue presented in the pleadings.

The case was then heard upon the pleadings and the remaining proof, and the Chancellor, being of opinion that complainants were entitled to no relief, dismissed their bill. From that decree they have appealed to this Court, and assigned errors.

No exception was taken in the Court below to the action of the Court with respect to the rejected evidence, as must have been done to make such evidence a part of the record in this Court (1 Hum., 431; 1 Swan., 291; 8 Lea, 453; 85 Tenn., 438; 91 Tenn., 54), and no objection is here made to that action.

It is well settled that the capital stock of a corporation is a trust fund for the payment of corporate debts; and that stock subscribers are liable to creditors of the company for unpaid subscriptions so far as the same may be necessary for the payment of

corporate debts. This is believed to be the universal rule in America, though not so in England. Cook on Stocks and Stockholders, Sec. 199; *Wetherbee* v. *Baker*, 35 N. J. Eq., 501; *Sawyer* v. *Hoag*, 17 Wal., 611; 2 Morawetz on Private Corporations, Sec. 780; 1 Beach on Private Corporations, Sec. 113–116; Thompson's Liability of Stockholders, Sec. 10; *Ohio Life Ins. Co.* v. *Merchants' Ins. Co.*, 11 Hum., 31; *Sawyer* v. *Upton*, 91 U. S., 60; Taylor on Private Corporations, Secs. 701 and 704; 2 Spelling on Private Corporations, Sec. 784.

It is quite as well settled that the subscriber may pay and satisfy his stock subscription either in money or in such property as the corporation may need, and agree to take, in good faith and at a fair valuation; and, if the property is taken at a fair valuation and in good faith, the payment is as effectual and as valid as though made in cash to the same amount. Cook on S. & S., Secs. 18–20, 423; 1 Morawetz, 425; *Searight* v. *Payne*, 6 Lea, 284, 285; *Albitztigui* v. *Guadalupe, etc., Mining Co.*, 8 Pick., 605; *Coit* v. *Gold Amalgamating Co.*, 119 U. S., 343; *Coffin* v. *Ransdell*, 110 Ind., 417 (S. C., 16 Am. & Eng. Corp. Cases, 432); Thompson on Liability of Shareholders, Sec. 134; Taylor on Private Corporations, Sec. 545; 2 Spelling on Private Corporations, Sec. 292; 35 N. J. Eq., 501.

In the case before us it is amply shown that the property assigned by Lambie and received by the Hercules Marble Company, in payment of his stock

subscription, was such as the corporation needed in the operation of its business, and, consequently, such as it had the legal right to purchase. About this there can be no dispute, upon this record, and beyond this there is no proof before this Court with respect to the value of that property.

The controlling question raised by the assignments of errors, and reply thereto, is one of pleading and practice. For complainants, it is contended that the burden was upon the defendants to show, by proof, independent of the fact of assignment by Lambie and acceptance by the corporation, that the property assigned by him to the corporation was reasonably worth the par value of his stock; while, on the other hand, the contention for the defendants is that it was incumbent upon the complainants first to allege, and then to prove, that the property so assigned was not reasonably worth so much.

The contention of the defendants, both as to the matter of pleading and as to the burden of proof, is well sustained upon principle and upon authority. It is a fundamental maxim in chancery pleading and practice, that the complainant must give the defendant notice of the case to be made against him, by alleging in the bill the facts intended to be proved, and that proof of facts not so alleged, will be rejected because not responsive to the issue. Story on Equity Pleading, Secs. 27, 28, 257; 1 Daniell's Chancery Pleading and Practice, 327, 852; Beach on Modern Eq. Prac., Secs. 89, 95, 99;

Morris v. *Langfield*, 4 Heis., 217; *Austin* v. *Rawson*, 3 Tenn. Ch., 121.

It having been lawful for Lambie to sell, and for the corporation to buy such property as he assigned in payment of his stock, and they having exchanged one for the other, we can see no good reason why their contract in that behalf should not be binding upon all parties concerned or affected thereby, so long as it remains unimpeached. Nothing appearing to the contrary, the law presumes the contract to have been made in good faith, and the property of Lambie to have been sold and bought at a fair valuation: and when the defendants established the fact of the contract and its terms, without more, they thereby made a *prima facie* case of valid payment by Lambie.

The parties having been competent, under the law, to contract with each other with respect to the matter before them, they are presumed to have done what they had a legal right to do, rather than what they had no legal right to do.

As to the burden of proof, Mr. Daniell says: "In general, it may be taken for granted that wherever a *prima facie* right is proved, or admitted by the pleadings, the *onus probandi* is always upon the person calling such right in question. * * * Indeed, in all cases where the presumption of law is in favor of a party, it will be incumbent on the other party to disprove it, though in so doing he

may have to prove a negative." Daniell's Chancery Pleading and Practice, pp. 850, 851.

Judge Dillon, in a case like this one, says: "The plaintiff—a single creditor—does not, for himself and other creditors, file a bill to impeach as fraudulent this transaction between the corporation and the original stockholders; but he simply states that the shares of stock issued to Hazard have not been paid for, either by him or the defendant, the transferee and present holder of the stock. Issue was taken on this averment, and the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz.: By a conveyance of the mining property to the corporation. Unless this agreement is rescinded or set aside for fraud, how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive, unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made." *Phelan* v. *Hazard*, 5 Dillon, 50.

In the case of *Coit* v. *Gold Amalgamating Co.*, 119 U. S., 345, Mr. Justice Miller said: "If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in

property, and the shareholders honestly, and in good faith, put in property instead of money, in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case, there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund, liable to the payment of their debts. But where full-paid stock is issued for property received, there must be actual fraud in the transaction, to enable creditors of the corporation to call stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud."

The Supreme Court of Indiana has said: "The principles deducible from the authorities already cited is that, even in case of an overvaluation of property transferred to the corporation in payment of shares, the transaction, unless void for some reason, is binding so long as it is not impeached by the corporation or its assignee; and it can be impeached only for fraud upon the corporation." *Coffin* v. *Ransdell*, 110 Ind., 417.

In each of the two cases last referred to, there was a charge that the property received by the corporation, in payment of stock, was taken at an overvaluation. In a later case, decided by the Supreme Court of Indiana, the opinion is concluded in

these words: "In disposing of this case, we think it proper to say that it is apparent that the issues were not broad enough to permit the introduction of the evidence by which the appellants sought to establish their case. The case made in the pleadings depended entirely upon the allegations of non-collection of the capital stock of the company. The order made by the board of directors, introduced by the plaintiffs, and the contract between the water company and Comegys & Lewis, given in evidence by defendants, show that the full amount of the capital stock had been paid, to the satisfaction of the contracting parties. In the well considered case of *Coffin* v. *Ransdell*, 110 Ind., 417, it was held by this Court that such payment could only be impeached for fraud. No suggestion of fraud is made in the pleadings, and, without making charge of fraud in the complaint, the plaintiffs could introduce no evidence to show, or tending to show, fraud as a basis of recovery." *Clow* v. *Brown*, 31 N. E. Reporter, 362.

In a case somewhat like the one before us, the Supreme Court of Maryland has said: "So long as the transaction stands unimpeached for fraud, Courts will treat as a payment that which the parties themselves have agreed shall be a payment; and this, too, in cases where the rights of creditors are involved." *Brant* v. *Ehlen*, 59 Md., p. 1.

Mr. Cook says: "It is now well settled that, in order to invalidate an issue of stock, which is issued for property taken at an overvaluation, it must be

shown, not only that there was an overvaluation, but also that such overvaluation was intentional, and, consequently, fraudulent." Cook on S. & S., Secs. 35 and 47.

Mr. Thompson, after considering the question of paying for shares in property, through several sections of his work on Liability of Stockholders, concludes as follows: "The whole discussion resolves itself into the following conclusions: A corporation may take, in payment of its shares, any property which it may lawfully purchase. Such a transaction is not *ultra vires* or void, but is valid and binding upon the original share takers and upon the corporation, unless it is rescinded; or set aside for fraud. While such a contract stands unimpeached, the Courts, even where the rights of creditors are involved, will treat that as payment which the parties have agreed shall be payment." Thompson's Liability of Stockholders, Sec. 134.

Mr. Taylor, after announcing as well recognized the rule that property may be taken in payment for stock, continues: "Such transactions may be opened to show fraud, and, if the property received is grossly unequal in value to the par value of the shares, the shareholder who received the shares originally, or his subsequent transferee with notice of the circumstances, may be compelled to make up the difference in value, in a suit brought by or on behalf of persons injured thereby." Taylor on Private Corp., Sec. 545.

Mr. Spelling says that such transactions "have been upheld against creditors only where the contract for the rendition of services or the purchase of property, payable in stock, has been made in good faith, and the property taken in payment has been put in at a fair, *bona fide* valuation. Such payment discharges a party from his liability to creditors upon his subscription, though it be excessive, provided that, in fixing and accepting it, the agents of the company have acted in good faith." 2 Spelling on Private Corp., Sec. 792.

Gogebec Investment Co. v. *Iron Chief Mining Co.* is a case in which a creditor of an insolvent corporation sued certain of its stockholders to recover unpaid stock, upon the allegation that they had transferred to the corporation certain mining property at ten times its real value, and obtained therefor full-paid stock. Hearing the case on demurrer, the Court said: "In an action against the stockholders of a corporation, to compel them to contribute to the payment of the debts of the insolvent corporation, it is only necessary, in order to make out a *prima facie* case, to establish the fact that the stockholder has not, in good faith, paid the par value of his stock to the corporation."

In the same case it is said: "The allegations of the complaint, which are admitted to be true by the demurrer, show conclusively that the stockholder defendants have not, as between themselves and the creditors, paid in full for their stock, and are, there-

fore, liable to make further payment, for the benefit of the plaintiff, as a creditor of the corporation. This is all that is necessary, under our statute or at common law, to make a case against the stockholder of unpaid stock, in favor of a creditor of the insolvent corporation." 23 American State Reports, pp. 419–21 (S. C., 78 Wis., 427).

Similar relief was sought in the case of *Elyton Land Co.* v. *Birmingham Warehouse and Elevator Co.*; wherein the Court concluded an exhaustive opinion in the following words: "The statements of fact in the bill support the conclusion therein averred, that the transaction by which payment for the stock was attempted to be made, was merely colorable; in other words, that it was not really a payment, but had only the outward appearance, without the substance, of a payment. Such being the case, the individual defendants are still liable on their stock subscriptions, to the extent that the attempted payment falls short of a *bona fide* compliance with the terms of the contract. And the allegations as to excessive overvaluation of property in question, were sufficient, under the rules above stated." 25 Am. State Reports, pp. 82–3 (S. C., 92 Ala., 407).

The late case of *Lloyd* v. *Preston*, is one in which creditors of an insolvent corporation sought to compel a stockholder to pay his subscription. In the original bill, complainants alleged that no part of the stock subscriptions had been paid. Defense was made on the ground, as claimed in the answer, that full

payment had been made by the transfer of property. Thereupon, an amended bill was filed, alleging collusion between the directors of the corporation and defendant, Harper; and that the "property transferred by Harper to the company was not worth one fiftieth part" of the sum at which he sold it; and that he knew that fact at the time. The hurtful part of the amended bill was denied by Harper.

The Circuit Court, hearing the case upon these pleadings and proof, found "that the entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature."

Mr. Justice Shiras, speaking for the Supreme Court, on appeal, said: "It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to capital stock, was so gross and obvious, as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up." 146 U. S., p. 642.

The foregoing quotations from text writers and adjudicated cases, abundantly sustain the proposition that the transaction whereby Lambie obtained full paid stock as the price of property conveyed, must stand until impeached by appropriate allegation and proof; and that, until that is done, no liability can be fixed upon any holder of that stock for further

payment. No such liability can arise by presumption from the mere fact that property instead of money was used in paying for the stock.

This is conclusive of the whole case, for all of the defendants are holders of parts of the Lambie stock, all of which, upon this record, must be treated as full paid and non-assessable; whether purchased by the present holders from the corporation, one of his transferees, or from other transferees, or from him directly. In the hands of Lambie it would be so regarded. In the hands of others after him, whether donee or purchaser, it is at least upon as high a plane.

Let the decree be affirmed.

Judge Wilkes dissents.

BANK *v.* MANN.

(*Knoxville.* October 30, 1894.)

1. INDORSEMENT OF USURIOUS NOTE. *Its effect.*

The indorsement of a negotiable note, void upon its face for usury, does not, without more, pass to the indorsee any right to recover of the maker upon the original consideration for which the note was given. (*Post*, *pp. 21*, *22.*)

Case cited and approved: Ottenheimer *v.* Cook, 10 Heis., 309.

2. USURY. *Defense of available without pleading, when.*

If usury appears upon the face of the note sued on, it is not essential that the defense shall be made by plea. (*Post*, *p. 22.*)

Cases cited: Isler *v.* Brunson, 6 Hum., 277; Hutchins *v.* Turner, 8 Hum., 417; Causey *v.* Yeates, 8 Hum., 608; Thompson *v.* Collins, 2 Head, 444; Caruthers *v.* Andrews, 2 Cold., 385; Gill *v.* Creed, 3 Cold., 298; Thornburg *v.* Harris, 3 Cold., 172; Cate *v.* Blair, 6 Cold., 640; Richardson *v.* Brown, 1 Leg. R., 352.

3. SAME. *Does not exist, when.*

A note bearing eight per cent. interest, and inadvertently dated and made payable in this State, can be collected in our Courts upon averment and proof that it was actually made in another State where that rate of interest was lawful, and that it was intended to operate under the laws of that State. (*Post*, *pp. 22–25.*)

4. SAME. *Same.*

A note bearing eight per cent. interest is not usurious, and may be collected, upon proper averment and proof of the facts, where it was given for the price of goods purchased on a credit, and this rate of interest was adopted solely as a method of expressing the difference between the cash and credit price of the goods. (*Post*, *pp. 23*, *24.*)

Cases cited and approved: Garrity *v.* Cripp, 4 Bax., 86; Brown *v.* Gardner, 4 Lea, 157; 72 U. S., 509; 6 L. R. A., 427; 1 Metcalf, 663; 22 N. Y., 427.

5. COLLATERAL SECURITY. *Suit by holder not abated by payment of principal debt.*

The holder of a note as collateral security may prosecute his suit thereon to judgment, notwithstanding the payment pending his suit of the principal debt, but his recovery will inure to the benefit of his debtor, and be subject to all equities existing between the latter and the maker of the note. (*Post*, *pp.* 24, 25.)

Cases cited and approved: 32 Am. Rep., 453: 34 Am. Dec., 523.

FROM KNOX.

Appeal from Chancery Court of Knox County. HENRY R. GIBSON, Ch.

JAMES W. CRUMLEY and KIRKPATRICK, WILLIAMS & BOWMAN for Bank.

WILLIAMS, HENDERSON & DAVIS for Mann.

WILKES, J. This is an action upon a note in the following words:

"$2,668. KNOXVILLE, TENN., May 11, 1891.

"Eighteen months after date I promise to pay to the order of R. G. Johnson $2,668.00, at Holston Banking and Trust Company. Value received, with interest at eight per cent. per annum.

"E. B. MANN."

"Indorsed: W. W. AVERY,

"R. G. JOHNSON."

The note was not paid at maturity, and was duly protested and notice given, and the bill is filed against the maker and indorsers by the First National Bank of Johnson City and E. S. Wolfe.

The bill alleges that the note was executed as part of the consideration for a stock of furniture in Asheville, North Carolina, and was indorsed to complainant in due course of trade, for value, and before maturity; that while the note on its face purports to be executed at Knoxville, Tenn., it was in fact executed with reference to the laws of North Carolina, which permit the charge and collection of eight per cent. per annum as interest, and said note was intended to be, and was in fact, a North Carolina contract; that the stock of furniture was sold on terms of part cash and the balance on a credit, and the rate of interest provided for in said note was but a means of compensating for the time granted for the payment of the balance of the purchase price, and was in no sense meant to be a charge for the use of money, and is not in either aspect usurious, but is a property contract.

The bill further alleges that, in addition to the transfer of the note, the claim of Johnson against Mann, based on the original consideration, has been transferred to complainants, and they have been requested to bring the suit by said Johnson.

The prayer is for judgment on the note and eight per cent. interest and protest fees, or, in the alternative, for the amount of the original consideration;

the recovery to go into the hands of the bank, to be disbursed according to the rights of the parties.

The parties were served except Avery, who appears not to have been found, and no further action appears to have been taken as to him.

Johnson answered admitting the execution of the note and the consideration, and that it was a North Carolina contract, and that under the laws of that State eight per cent. was legal interest; that the note was transferred as collateral to Wolfe before maturity, and that the bank had no interest in the note except a right to use its proceeds during certain litigation between Wolfe and Johnson; denies that any claim against Mann on the original consideration had ever been assigned to Wolfe or the bank, and denies that the suit was at his request, and denies all liability.

Mann also answered, and with his answer filed demurrer, assigning as grounds: (1) That the note sued on was usurious and illegal on its face, and could not be enforced; (2) that the note extinguished all prior claims; (3) that the suit was multifarious in seeking to enforce the note, and, at the same time, to set same aside and recover on the original consideration. The demurrer was overruled.

The answer set up, that there had been fraudulent misrepresentations in the original sale as to the stock of merchandise sold; that the trade was actually made in Tennessee, and the notes accidentally executed in North Carolina, but dated and made pay-

able in Tennessee, and for property located in both States; denies that the contract was a North Carolina contract, or intended to be controlled by the interest laws of that State; that the note is illegal because it provides for a usurious rate of interest on its face, and its terms cannot be changed by parol; that the bank held the note as collateral, and subject to all equities between the original parties.

The case proceeded to proof and hearing, when the Chancellor held that complainants, because of insufficiency of interest or title in the note sued on, were not entitled to recover, and dismissed the bill. From this decree complainants appealed, and defendant, Mann, also appealed from the decree of the Chancellor overruling the demurrer, and each appellant has assigned errors.

It further appears in the proof that the complainants, bank and Wolfe, each held this note simply as collateral, and that the debts for which it was held have been wholly paid pending this litigation.

It is evident the complainants must recover upon the note sued on in this case, if they recover at all, as the proof shows conclusively that no assignment of any claim growing out of the original consideration was ever transferred to them; the only transfer made to them or held by them being the note and its indorsements, and there was never any promise to them except as shown by the note. It has been repeatedly held that when a contract is usurious on its face, the payee may sue on the orig-

inal consideration, but an assignee or indorsee cannot recover without an express promise to him. *Ottenheimer* v. *Cook*, 10 Heis., 309.

No recovery can, therefore, be had in this suit against the defendants, unless it can be maintained upon the note and its indorsements.

It is next insisted the note is usurious on its face. If so, there can be no recovery upon it, as the Court will not enforce an illegal contract. *Isler* v. *Brunson*, 6 Hum., 277; *Hutchins* v. *Turner*, 8 Hum., 417; *Causey* v. *Yeates*, 8 Hum., 608; *Thompson* v. *Collins*, 2 Head, 444; *Caruthers* v. *Andrews*, 2 Cold., 385; *Gill* v. *Creed*, 3 Cold., 298; *Thornburg* v. *Harris*, 3 Cold., 172; *Cate* v. *Blair*, 6 Cold., 640; *Richardson* v. *Brown*, 1 Leg. Rep., 352. And this would be so without any plea of usury sworn to, as the defense rests upon the illegality appearing on the face of the instrument, and not as set up by the pleadings or as developed by the proof.

It is insisted, however, in argument that the note is not usurious, because it was executed in North Carolina, where eight per cent. is legal interest. The note appears on its face to be executed at Knoxville, and is shown by the proof and the face of the note, to be payable at Knoxville. It appears that the proposition of sale was submitted to defendant, Mann, in Knoxville, and accepted by him there, and that fact was wired to Johnson, at Asheville. After the invoice was taken at Asheville, the note

was executed at that place, and delivered at that place, upon a blank used in the Knoxville business, the parties having been interested in a business conducted both at Knoxville and at Asheville.

It is also contended that the contract is a property contract, and the rate of interest was part of the purchase consideration given for the property, and was not for a loan of money or forbearance of a debt, which constitutes usury under our law.

The argument is that the eight per cent. agreed to be given is a part of the consideration to be given, and is but a mode of expressing the difference between the cash and credit price of the goods sold; and that it is not usurious to charge more than legal interest when credit is given, and this difference in credit and cash price may as well be put in the shape of a per cent. for the time credit is extended as in the shape of a round sum for such time or credit. In other words, a party may be willing to take for a horse one hundred dollars in cash, but would not be willing to sell the same horse, on twelve months credit, for less than one hundred and twenty dollars, and such sale at one hundred and twenty dollars would be legal, and not in any respect usurious, and it is now insisted it cannot matter whether the additional amount of twenty dollars charged for this credit is stated as a round sum or as a per cent. upon the one hundred dollars for the twelve months credit granted.

This contention is well supported by authorities in

our own State and elsewhere. *Garrity* v. *Cripp*, 4 Bax., 86; *Brown* v. *Gardner*, 4 Lea, 157; *Rogers* v. *O'Neal*, 6 L. R. A., 427; *Tousey* v. *Robinson*, 1 Metcalf, 663; *Graeme* v. *Adams*, 14 Am. Rep., 130; *Cutler* v. *Wright*, 22 N. Y., 427; *Hansbrough* v. *Peck*, 72 U. S., 509.

We think the allegations of the bill, as well as the proof, bring this contract within this rule, even if it should be considered a Tennessee contract. There is in it neither the loan of money nor the forbearance of a debt, and the per cent. agreed to be given for the credit was a part of the original consideration for the trade, and we are unable to see in it any device or attempt to evade the usury laws.

There is another feature in the case that is material to mention. It appears from the proof that, pending this litigation, the debts due the bank and Wolfe have been paid, for which this note was pledged as collateral, and neither the bank or Wolfe have now any interest in the recovery. Still, under the law, notwithstanding the principal debt has been paid pending suit on the collateral, such suit may properly continue to judgment, and, if the holder collect the same, he will hold it as trustee for the benefit of the debtor—that is, the owner of the collateral. Jones on Pledges, Sec. 664; *Logan* v. *Cassell*, 32 Am. Rep., 453. But this is only when the maker will not be thereby deprived of some equitable defense he might have against the payee;

or, in other words, the holder can only recover subject to the equities of the maker against the payee. *Logan* v. *Cassell*, 32 Am. Rep., 453; 2 Parsons on Notes and Bills, 437; *Pearce* v. *Austin*, 34 Am. Dec., 523.

In this case it is alleged that there are equities as between Mann, the maker, and Johnson, the payee of the notes, and some proof is taken on that point, but it is not sufficient to determine the rights of these parties as between themselves, nor has the case been passed upon in the Court below with a view to an adjudication and determination of these equities.

We are of opinion, from the record, that the contract is a North Carolina contract, and so intended, and the fact that the note is dated Knoxville, and payable in Knoxville, arises simply from an accidental use of a blank note with these words in it, and not from a design to make it a Tennessee contract, or that it should be governed by Tennessee law.

This being so, complainants have the right to collect the note from Mann, and hold the proceeds as trustee for Johnson, but subject to all equities existing between Mann and Johnson arising out of the trade between them.

The decree of the Chancellor is reversed, and the cause remanded for such further proceedings as may be necessary to fix the rights and equities between

Mann, the maker, and Johnson, the payee, growing out of their contract of sale and purchase.

The costs of the appeal will be paid equally by Mann and Johnson, and the costs of the Court below will be adjudged on final hearing.

BRADLEY *v.* CARNES.

(*Knoxville.* October 30, 1894.)

WILL. *Unlimited power of disposition given first taker.*

The first taker acquires an unlimited power of disposition, and consequently the absolute estate, cutting off remaindermen, under a husband's will bequeathing all his property to his widow "for her special comfort, benefit, and support," authorizing her to sell and convey the lands "if she thinks it advisable," and making provision for remaindermen only in the event "anything remains at her death."

Cases cited and approved: Smith *v.* Bell, M. & Y., 302; David *v.* Bridgeman, 2 Yer., 557; Davis *v.* Richardson, 10 Yer., 290; Bean *v.* Meyers, 1 Cold., 227; Davis *v.* Williams, 85 Tenn., 651; Troup *v.* Hart, 7 Bax., 188; Turner *v.* Durham, 12 Lea, 316; Booker *v.* Booker, 5 Hum., 507; Brown *v.* Hunt, 12 Heis., 409; Read *v.* Watkins, 11 Lea, 161; Sevier *v.* Brown, 2 Swan, 112; Ballentine *v.* Spear, 2 Bax., 273; 109 U. S., 725; 23 Am. Rep., 1.

Cited and distinguished: Deaderick *v.* Armour, 10 Hum., 588; Pillow *v.* Rye, 1 Swan, 185; Downing *v.* Johnson, 5 Cold., 229; McGavock *v.* Pugsley, 12 Heis., 689; Pool *v.* Pool, 10 Lea, 486; Jourolmon *v.* Massengale, 86 Tenn., 81.

FROM KNOX.

Appeal from Chancery Court of Knox County. HENRY R. GIBSON, Ch.

LUCKY & SANFORD for Complainants.

GREEN & SHIELDS, WALTER M. COCKE, and W. L. LEDGERWOOD for Defendants.

WILKES, J. The question before the Court in this case is the proper construction of the will of G. W. Carnes, especially the third clause of the same. This item is as follows:

"I give and bequeath to my wife, Sarah J. Carnes, all the remaining property, both personal and real, for her special comfort, benefit, and support. If she thinks it advisable, she may sell and convey the right of the land. If anything remains at her death, it shall go into the hands of my executor, and shall and divide equally in half of the proceeds between my wife's, Sarah J. Carnes, brothers and sisters, and the other half shall be divided equally between my own, G. W. Carnes, brothers and sisters, with the exception of the heirs of Martha B. Hill, and I will them one dollar, and no more."

As thus copied into the transcript, the language of the third clause is quite obscure, but counsel have treated the clause as though it read as follows:

"If anything remains at her death, it shall go into the hands of my executor (who shall sell the same), and shall divide equally (one) half of the proceeds between my wife's, Sarah J. Carnes, brothers and sisters, and the other half shall be divided equally between my own, G. W. Carnes, brothers and sisters, with the exception of the heirs of

Martha B. Hill, and I will them one dollar, and no more."

The obscurity in the clause, as copied into the transcript, doubtless arises from some clerical error in copying, and the clause will therefore be considered as counsel have treated it, which is doubtless the true copy of the clause, as is shown in the final decree construing the clause in the Court below. The other parts of the will are not material in this investigation.

The Chancellor held that Sarah J. Carnes, the wife, took an absolute estate in all the property, both real and personal, devised in the clause of the will to her, and that the devise over was void and of no effect, and that the property, upon the death of said Sarah J., descended to her heirs, to the exclusion of the heirs of the husband, G. W. Carnes.

A. C. Carnes, one of the defendants, and a brother of the testator, G. W. Carnes, appealed, and it is now insisted that the Chancellor erred in construing the clause as he did.

G. W. Carnes, the testator, died in 1874, leaving his widow, Sarah J., but no children. Immediately upon his death, Sarah J. went into possession of the land and personal property given to her by the will, used it as her own, conveyed a part of the real estate devised, purchased other lands, and died intestate in March, 1892, leaving no children.

Complainants are the brothers and sisters of Sarah J. Carnes and their descendants, while defendants are

the brothers and sisters of Geo. W. Carnes and their descendants.

There is no difference between counsel as to the general principles of the law applying to this clause in the will, but, like the cases in which the class doctrine is involved, the difficulty is in deciding whether this case falls within the rule which gives the first taker an absolute estate and renders the remainder inoperative and void.

The general principle is tersely stated as follows: If the first taker is given an estate in fee or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker, and the limitation over is void. If the power is dependent upon a contingency, or if the power be definitely qualified, the estate of the first taker is limited to life, and the remainder over takes effect.

Under the first head may be found a large number of cases, of which some are: *Smith* v. *Bell*, M. & Y., 302; *David* v. *Bridgeman*, 2 Yer., 557; *Davis* v. *Richardson*, 10 Yer., 290; *Bean* v. *Meyers*, 1 Cold., 227; *Davis* v. *Williams*, 1 Pick., 651; *Troup* v. *Hart*, 7 Bax., 188; *Turner* v. *Durham*, 12 Lea, 316.

The principle underlying these cases is that, in order to constitute a valid remainder or executory devise, the first taker must not be given power to defeat and extinguish it by sale or otherwise at his will and pleasure. It is held that this unlimited power of disposition must be given by the will, and

cannot arise as a mere incident to the estate granted. *Booker* v. *Booker*, 5 Hum., 507; *Brown* v. *Hunt*, 12 Heis., 409; *Read* v. *Watkins*, 11 Lea, 161.

Still, the power of disposition may be given not only in express words, but also by words necessarily implying such power. *Serier* v. *Brown*, 2 Swan, 112, 116; *Howard* v. *Camsi*, 109 U. S., 725; *Jones* v. *Bacon*, 23 Am. Rep., 1; *Ballentine* v. *Spear*, 2 Bax., 273.

The other class of cases is illustrated in *Deaderick* v. *Armour*, 10 Hum., 588; *Pillow* v. *Rye*, 1 Swan, 185; *Downing* v. *Johnson*, 5 Cold., 229; *McGavock* v. *Pugsley*, 1 Tenn. Ch., 410 (12 Heis., 689); *Pool* v. *Pool*, 10 Lea, 486; *Jourolmon* v. *Massengale*, 2 Pickle, 81.

In all the cases, whether the will expressly gives a life estate or simply uses words implying such limited estate, the controlling question is, Does the will give an unlimited or only a contingent and modified power of disposition to the first taker?

In the case of *Deaderick* v. *Armour*, 10 Hum., 588–594, the conveyance was to a trustee for a married woman, and the power was to sell, use, and dispose of it as she may think fit, but by and with the consent of the trustee.

In *Pillow* v. *Rye*, 1 Swan, 185, the gift was of the use of the property—that is, its rents and profits, but if for any cause it became necessary for her ease and comfort to use any portion of the principal, then it should be done. The Court held

that the power in this case was contingent upon its becoming necessary for her ease and comfort.

In *Dancing* v. *Johnson*, 5 Cold., 229, it was held that the life tenant had the right to consume the corpus of the estate, except the land, if her support and maintenance, in her discretion, require it, and yet the devise over of the "balance" of property on hand at her death was good.

In *McGavock* v. *Pugsley*, 1 Tenn. Ch., 411 (12 Heis., 689), the authority to sell was for the convenience and support of the life tenant "and our two daughters," and the Chancellor held that the power of disposition was limited, and hence the limitation over was good.

With these illustrations of the rule before us, it only remains to determine whether the power of disposition in Mrs. Carnes was unlimited. The property was willed to her for her special comfort, benefit, and support, "and, if she think it advisable, she may sell and convey the right of the land." This is equivalent to saying she may sell and convey if she wishes or wills to do so. If she had disposed of the land in her lifetime can it be doubted that the purchaser would have taken a good title? The language of the devise over is: "If anything remains at her death, it shall go," etc. This must necessarily mean that during her life she could have consumed and disposed of it all.

In this case, the gift is of a fee, and the words "for her special comfort, benefit, and support," cannot

be held to curtail or limit such estate. It is not a case of a life estate with power of disposition, in which, it may be, the rule will be more strictly applied, as is said in *David* v. *Bridgeman*, 2 Yer., 576, note. Her power of disposition does not depend on the concurrence of a trustee, as in *Deaderick* v. *Armour*, 10 Hum., 588. Nor is the power contingent upon its becoming necessary for her ease and comfort, as in *Pillow* v. *Rye*, 1 Swan, 185. Nor upon its being required for her support and maintenance, as in *Downing* v. *Johnson*, 5 Cold., 229. Nor upon the convenience and support of the life tenant and her daughters, as in *McGavock* v. *Pugsley*, 1 Tenn. Ch., 411. But the power is unlimited, and to be exercised whenever she deems it advisable.

We are of opinion the power of disposition was unlimited in the first taker, and, this being so, the remainder over was inconsistent with it, and void, and the estate of Mrs. Carnès was absolute, and descended on her death to her heirs, and the decree of the Chancellor is affirmed with costs.

KLEIN v. KERN.

(*Knoxville.* November 1, 1894.)

1. GUARANTY. *Matures, when.*

A guaranty by a third person that a mortgageor will, in consideration of a st pulated indulgence upon the mortgage, pay to the mortgagee, upon the debt secured, a stated sum, "together with the interest due on the whole indebtedness, as well as all expenses incurred on or before November 1, 1892," matures and becomes payable on November 1, 1892, in the absence of other controlling provision on that subject. (*Post, pp. 35, 36.*)

2. SAME. *Absolute, when.*

And such guaranty is absolute. Suit lies thereon without previous demand of the mortgage debt, or notice of default, or exhaustion of the mortgageor's property. It is immaterial whether the mortgagee is solvent or insolvent. (*Post, p. 37.*)

Cases cited: Hunter *v.* Dickinson, 10 Hum., 36; Taylor *v.* Ross, 3 Yer., 330; Irvine *v.* Brasfield, 10 Heis., 428; Yancey *v.* Brown, 3 Sneed, 89.

3. SAME. *Parol evidence not admissible to change.*

A written guaranty, whose language is plain and unambiguous, cannot be changed by parol evidence. (*Post, p. 37.*)

FROM KNOX.

Appeal from Chancery Court of Knox County. H. R. GIBSON, Ch.

Klein *v.* Kern.

TEMPLETON & CATES for Klein.

YOE & CORNICK for Kern.

WILKES, J. This is a bill to hold defendant liable as guarantor upon the following paper writing:

"In consideration of V. Klein withdrawing his advertisement in the *Weekly Sentinel*, and not selling the property therein advertised to be sold at public auction on Saturday, November 12, 1892, under the deed in trust or mortgage executed by J. F. Haupt to said Klein (to all of which reference is hereby made), I guarantee that J. F. Haupt, will pay to V. Klein, on account of the debt due him from Haupt, the sum of $1,000, together with the interest due on the whole indebtedness, as well as all expenses incurred on or before November 1, 1892.

(Signed) "PETER KERN."

Defendant demurred to the bill, and assigned as grounds: (1) That no demand for payment had been made of Haupt and complainant had not exhausted his remedy against him on the mortgage or deed in trust held by complainant; that no action has been taken on the same, and defendant's undertaking was not to pay any sum himself, but that Haupt, the debtor, would pay. (2) Because the guaranty is void for uncertainty in its terms and provisions.

The Chancellor overruled the demurrer, and defendant answered, and the cause proceeded to hearing on the proof, when the Chancellor held that the

defendant was liable upon the paper as an absolute guaranty for $1,000, and the interest upon the entire debt secured by the mortgage, and all expense incurred to November 21, 1892, and that the instrument fixed the date of payment, as well as the date when interest and cost should cease, at November 21, 1892, and referred the cause to the Master to report the amount due under the guaranty as thus construed. Report was made and excepted to, and, upon exception being sustained, was referred, and decree rendered for $1,226.50, from which defendant prayed an appeal, and has assigned as error the action of the Chancellor, first, in overruling the demurrer, and, second, in giving decree for the amount of $1,226.50.

The real points in controversy are that the guarantee fixes no date by which payment was to be made, the date fixed, November 21, 1892, being merely intended as the date at which interest and expenses were to cease, and not as a limit for payment.

We think the Chancellor's construction was correct, and the date fixed was the time at which payment was to be made, as well as the date up to which interest and expenses were to be computed, and the guaranty matured at the date, November 21, 1892.

It is next said that no suit should have been brought until payment had been demanded of Haupt, and the trust deed given by Haupt to complainant enforced and the property exhausted, and then only for a deficit not to exceed the guaranty.

We think the guaranty was absolute for the amount specified, and was by the parties intended to secure that amount independent of the trust deed, and as additional security to complainant, who was insisting, as defendant in his answer states, that the property would not sell for enough to pay his debt, and it does not provide for a deficit, but an amount independent of the mortgage.

It is well settled in Tennessee that when the guaranty is absolute no demand or exhaustion of the maker is required, nor is any notice required of the acceptance or default.

It does not matter whether the guaranty stipulates that the maker will pay, or that the guarantor will pay, nor whether the maker is solvent or not. In either event the undertaking is absolute, and the guarantor must pay the amount or see that it is paid. It is not the case of a guaranty of solvency or collectibility, which requires previous demand and suit. *Hunter* v. *Dickerson*, 10 Hum., 36; *Taylor* v. *Ross*, 3 Yer., 330; *Irvine* v. *Brasfield*, 10 Heis., 428; *Yancy* v. *Brown & Appleton*, 3 Sneed, 89; Randolph on Commercial Paper, Sec. 880; Brandt on Suretyship and Guaranty, Sec. 165; Daniel on Negotiable Instruments, Sec. 1786.

The terms of the guaranty cannot be changed by parol proof of what the parties intended, as we think its language plain and unambiguous.

The decree of the Chancellor is affirmed with costs.

BANK *v.* O'BRIEN.

(*Knoxville.* November 1, 1894.)

DEED. *Wife not competent subscribing witness to husband's deed.*

The wife is not a competent subscribing witness to her husband's deed.

Code construed: §§ 2038, 2858, 3813*e*, 3813*f* (T. & S.); §§ 2850, 2873, 4563 (M. & V.).

Acts construed: Acts 1869-70, Ch. 19; Acts 1879, Ch. 200.

Case cited and approved: Beadles *v.* Alexander, 9 Bax., 607.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. MCCONNELL, Ch.

WHITE, MARTIN & BOGLE for Bank.

WHEELER & MCDERMOTT for O'Brien.

CALDWELL, J. M. J. O'Brien owned certain real estate in the city of Chattanooga, which he and his wife, Mrs. Natalie O'Brien, jointly conveyed in trust for the benefit of certain of his creditors named in the trust deed. As to M. J. O'Brien, the conveyance was attested by his wife and their daughter, Miss Julia O'Brien, as subscribing witnesses. In

due time, Mrs. O'Brien appeared before the Clerk of the County Court, acknowledged the execution of the instrument by herself, and was privily examined, as required by law, and she and the daughter appeared before the same official, as subscribing witnesses, and proved the execution by the husband and father. Thus proved and certified, the conveyance was filed and registered.

Thereafter, the complainant in this cause, another creditor of M. J. O'Brien, filed this bill, impeaching the said conveyance, for the alleged reason that Mrs. O'Brien was not a competent subscribing witness, and seeking to subject the property therein described to the satisfaction of complainant's debt.

The Chancellor granted the relief sought, and the defendants appealed from his decree.

Was Mrs. O'Brien a competent witness to attest the execution of the deed by her husband?

The provision of law to be considered is in these words: "To authenticate an instrument for registration, its execution shall be acknowledged by the maker or proved by two subscribing witnesses at least." Code (1858), § 2038; (M. & V.), § 2850.

Clearly, the persons contemplated as subscribing witnesses are only those who would be competent to testify in a Court of Justice about the matter involved.

Originally the statute required that, in case of probate, the subscribing witnesses should be sworn and examined in open Court, by the Chief Justice

or presiding Judge, touching the execution and acknowledgment of the deed. Acts of 1715, Ch. 38, Sec. 5 (Scott's Laws of Tennessee, Vol. I., p. 26), and Acts of 1807, Ch. 85, Sec. 3 (*Ib.*, p. 1068).

Later statutes authorized Clerks of the County Court, or their duly appointed deputies, to swear and examine the witnesses. Acts of 1831, Ch. 90, Secs. 1 and 2; Acts of 1835, Ch. 53, Secs. 5 and 6 (Statutes of Tennessee, by Car. & Nich., pp. 591–8), and Acts of 1838, Ch. 150, Sec. 1 (Nicholson's Supplement, 236). Such is now the law. Code, § 2839; (M. & V.), § 2851, and subscribing witnesses must still be sworn and examined as if in open Court. Code, § 2058; (M. & V.), § 2873.

At the time of the adoption of the Code, in 1858, a married woman, by reason of coverture, was confessedly incompetent to testify in a Court of Justice, with respect to any deed or conveyance made by or to her husband, and, as a consequence, she was not competent as a subscribing witness to such instrument made by or to him.

A standard author says: "The object of requiring subscribing witnesses is to enable the other party to inquire into the circumstances attending the sealing and delivery. For this reason, they should be persons competent to testify to the facts in an action between the parties, or to testify generally. Hence, a wife, whether of grantor or grantee, is incom petent." 1 Devlin on Deeds, Sec. 259.

It is contended for defendants that legislation since

the Code of 1858 has changed the rule then existing as to the competency of subscribing witnesses.

By the Acts of 1869–70, Ch. 19, Sec. 2, and Ch. 78, Sec. 1 (Code, T. & S., §§ 3813*c* and 3813*f*), the rule as to the incompetency of witnesses by reason of interest and coverture, was modified; and by Chapter 200, of the Acts of 1879, it was still further changed. The rule established by the latter statute is now in force, and the first section thereof, as compiled by Messrs. Milliken & Vertrees, is as follows: "In all civil actions in the Courts of this State, no person shall be incompetent to testify because he or she is a party to or interested in the issue tried, or because of the disabilities of coverture; but neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation." Code (M. & V.), § 4563.

This statute is self-limiting upon its face. By its own terms, as well as by the titles of the original Acts, it relates alone to evidence in "civil actions in the Courts," and has no reference to subscribing witnesses to either deeds or wills. The probate of deeds or wills is not in the purview of the law; it was clearly not in the legislative mind. That it does not embrace subscribing witnesses to wills, this Court assumed as not debatable, or impliedly held in the case of *Beadles* v. *Alexander*, 9 Bax., 607.

In his recent and excellent treatise, Mr. Pritchard,

referring to the said Act of 1879, makes the following statement: "The recent legislation making parties to suits and persons interested in the issue tried competent witnesses, does not make legatees and other persons who were incompetent before, competent as subscribing witnesses; but it does make them competent to be examined as other witnesses, on an issue *devisavit vel non*, to prove extrinsic facts and acts and declarations of the deceased; the fact of their being interested going to their credit, and not to their competency." Pritchard on Wills and Administration, Sec. 210, p. 236.

Manifestly, subscribing witnesses, as such, whether to wills or deeds, were not contemplated in that Act; and the law, as theretofore existing with respect to them, remains unchanged.

Affirm the decree.

COLBURN *v.* RAILROAD.

(*Knoxville.* November 8, 1894.)

1. COUNTY COURT. *Jurisdiction over public bridges.*

County Court has exclusive and final jurisdiction to determine the necessity, utility, and propriety of building a public bridge, and to fix time and place of its erection. The action of the County Court, in this regard, cannot be revised or enjoined by the Chancery Court. (*Post, p. 48.*)

2. SAME. *Authority to issue negotiable bonds.*

County Court has not authority; in the absence of statute expressly conferring it, to issue negotiable bonds of the county for any purpose whatever. (*Post, pp. 49–53.*)

Cases cited and approved: 111 U. S., 400; 15 Wall., 566.

Cited and disapproved: State *v.* Anderson County, 8 Bax., 249.

3. SAME. *Contract for public bridge unauthorized, when.*

A contract between a county and a railroad company, entered into without the assent required by the Constitution of a three fourths majority of the people expressed at an election held, pursuant to law, for that purpose, is unauthorized and void, which provides that, in consideration of a stipulated sum to be paid by the county, the railroad company shall build a combined railway, wagon, and foot bridge over a stream for its own and the public use, and that the railroad company shall forever keep the bridge in repair, and shall construct certain lines of railway, and shall concede to the county the fee in certain portions of the right of way, and also for the public benefit, the use of its track by other companies, and special freight rates for particular products. By such a contract, the county becomes, in violation of the Constitution, a stockholder with the railroad company, and loans its credit to the railroad enterprise. (*Post, pp. 52–56.*)

Colburn *v.* Railroad.

Constitution construed: Art. II., § 29.

Act construed: Acts 1885, Ch. 149.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. W. L. EAKIN, Sp. J.

SHEPHERD & FRIERSON for Colburn.

T. D. YOUNG, WM. H. DEWITT, THOMAS & ELDER for Railroad.

WILKES, J. This is an injunction bill, brought by two taxpayers of Hamilton County, to enjoin the delivery to the railroad company of certain bonds of the county issued to secure the building of a free wagon and foot bridge across the Tennessee River at Chattanooga, and to have the bonds declared void and canceled.

The defendants, county of Hamilton and Chattanooga Western Railroad Company, demurred to the bill, and, on hearing, Special Chancellor W. L. Eakin overruled the demurrer, and made the injunction perpetual; but in the exercise of his discretion under the statute, granted an appeal, which was taken, and the county and railroad company have assigned errors.

The facts, so far as necessary to be stated, are that, at the July term, 1893, of the Quarterly Court of Hamilton County, the defendant railroad company made a proposition to the Court, looking to joint action and co-operation in building a combined railway, wagon, and foot bridge across the Tennessee River, from Chattanooga to the west bank of the river, at what is known as Moccasin Bend. This proposition the Court rejected, but, in lieu, took action as follows:

The Court, by resolution, determined and resolved (reciting that it was a county purpose, and in the discretion, judgment, and opinion of the Court, to the best interests of the county and the public welfare) that it, for county purposes, would build a wagon and foot bridge between the points mentioned.

The resolution further recited that the cost of the bridge would exceed the amount which could be realized from special taxation during the period covered by its erection, and that, in order to build and pay for the same, it would be necessary for the county to issue $150,000 of its bonds, bearing five (5) per cent. interest, and running twenty years to maturity, of the denomination of $1,000 each, and to be sold at not less than par.

The Court thereupon resolved, in substance, that if the defendant railroad company would, (1) in connection with its road and branches, construct a railroad bridge between the termini mentioned; (2) as a

part of said railroad bridge, and above the same, construct for the county, and for county purposes, a free wagon and foot bridge; (3) make the bridge abutments and approaches of size and strength, and according to plans approved by the county; (4) vest in the county the fee simple, unincumbered title to the railroad right of way, one hundred feet in width, for the distance of one mile from the north end of the bridge; (5) begin the work within six months, and finish it within three years, including a main line from Chattanooga to Middle Creek, and a branch from Middle Creek to the crest of Walden's Ridge, twenty-five miles distant from Chattanooga; and a branch from the end of the bridge, along the north side of the river, to a connection with the Cincinnati Southern Railroad; (6) guarantee to continually maintain the foundation, piers, and other substructures of the bridge, so as to keep the county's wagon and footway thereon safe, secure, and unimpaired; (7) allow any other railway to use the bridge and five miles of the defendant's railroad track, of main line, and (8) would carry, and require all other roads using the bridge to carry, all coal and coke, from any point on the line, within twenty-five miles of Chattanooga, to any point in the city, or suburbs, at a freight rate of not more than twenty-five cents per ton; then, when all these conditions shall be agreed to by the railroad company, the county would issue $150,000 of its bonds, and place the same in the First National Bank of the city

within ninety days after the proposition of the county was accepted, to be delivered to the railroad company only when the bridge and lines of railway are fully completed, and the conditions of the contract met, and the bridge paid for by the railroad company, and properly tested, and, when so delivered, to be in full payment and satisfaction for the construction of the said free wagon and foot bridge built for the county, the railroad company to have an easement over the strips of land, vested under the agreement in the county, so long as the contract provisions were complied with by the railroad company, but not longer.

It was further resolved, that the contract instrument should be registered, and its conditions and provisions run with the road and bridge and right of way into whatever hands they might thereafter pass.

On the same day that this resolution was passed, the railroad company, in open Court, accepted its provisions in writing, and the Court thereupon passed a resolution authorizing the issuance of the bonds, and their delivery to the bank, and the County Judge and bridge committee were authorized and directed to see to the erection, on the top of the railroad bridge, of the wagon and foot bridge provided for in the resolutions and agreement.

The demurrer to the bill proceeds upon the idea, among others of less importance, first, that the contract thus entered into constituted a giving or loaning of the credit of the county to the railroad with-

out submitting the same to a vote of the people of the county, contrary to the spirit and letter of the Constitution; second, that it was an effort on the part of the county, without such election being held, to become a stockholder with the railroad company in the bridge and right of way; third, that there was no public necessity for the bridge; fourth, that there was no public road to the bridge on either side of the river; fifth, that it was beyond the power of the county to be the joint owner in such manner of the bridge.

For defendants it is argued that such contract is authorized by and in conformity with the Constitution and general laws of the land; that the Chancery Court has no jurisdiction to inquire into the necessity, utility, or propriety of building a bridge, or its location, or time of erection, or as to the levy of taxes to pay for the same, because all these matters are exclusively in the discretion of the County Court; that the contract is not prohibited by any statute, or the Constitution, and the acts relied on to sustain the contract are constitutional, and the contract is not one giving or loaning the credit of the county to a railway, or becoming a stockholder therein.

Whether the arrangement proposed to be entered into by the county is a judicious one, and for the best interest of the county, is not for this Court to inquire, but the question with us is simply one of authority to do what the county proposes to do, in the way it is attempting to do it.

We think we need not consider many of the points raised and so ably argued by opposing counsel. We have been greatly aided by the very lucid, able, and exhaustive arguments made upon the points of law involved in the cause. The Constitution of 1870, as well as that of 1834, provides that the General Assembly should encourage a well-regulated system of internal improvements, in order to develop the resources of the State and promote the happiness and prosperity of its citizens.

That the Legislature has authorized the several County Courts to build jails, courthouses, and bridges in certain events, and raise money to pay for the same, will not be questioned. This necessarily presupposes the power to contract a debt for such purposes; and it is insisted that the right to create a debt carries with it, by necessary implication, the right to issue an evidence of that debt. This is, to a certain extent, conceded, for the county may, without doubt, issue its warrant on the County Trustee to meet the debts and demands against its treasury. But it is denied that this right extends to the issuance of bonds or commercial evidences of debt.

The case of *State* v. *Anderson County*, 8 Bax., 249, is referred to as holding "that a county, like any other corporation having a right to create a debt, has also the incidental right to issue the commercial evidence of it, in such form as may be satisfactory to the parties." It is true this lan-

guage is used in the opinion in that case, but as a general statement not really involved in the decision of the question before the Court.

In that case, the question of the subscription upon which the bonds issued had been submitted to a vote of the people, and the real question at issue was, whether the submission was according to the statutes, and the controversy was between the county and an innocent holder of the bonds after an acquiescence of sixteen years in their validity by the county, and the payment of interest upon them. The effect of ratification by the county, and an estoppel against it, were the controlling features of that case.

The mode of payment for bridges is expressly fixed by statute (M. & V. Code 1453), such payment to be made out of taxes annually assessed and collected by the County Trustee, and kept separate and subject to and paid out on the order of the Court, and the amount of such tax is limited by § 1452 to the same amount in any year as the State tax for that year. Special Acts have been and may be passed, authorizing counties to issue bonds to pay for bridges, courthouses, jails, etc., when these are the only objects to which the bonds are to be devoted. The exact question of authority in the county to issue bonds, in the absence of such a special statute, came before the Supreme Court of the United States in the case of *Claiborne County* v. *Brook*, 111 U. S. Rep., 400, a case arising under the general

statutes of our State, and that Court held "that counties are for the purpose of local police and administration, and that they have no power or authority to make or utter commercial paper of any kind, unless it is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." It was further held that, under the Code of Tennessee, contracts may be made by counties for the erection or repair of public buildings, and the power to issue vouchers for payment is necessarily implied, but no power is given, or can be implied, to issue bonds, or other commercial paper having the privileges and exemptions accorded to that class of commercial securities.

And, again, in the case of *Police Jury* v. *Britten*, 15 Wall., 566, the same Court says: "It is one thing for County Trustees to have the power to incur obligations for work actually done in behalf of the county, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations, which may be multiplied to an indefinite extent. If it be conceded that counties have an implied power to issue coupon bonds payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated."

We are clearly of opinion that this is sound law, and that the county of Hamilton, *under the*

general statutes of the State, had no express or implied authority to issue the bonds proposed to be issued by them in this instance.

But defendants claim that the county had such right under the provisions of an Act of the General Assembly of 1893, Chapter 116. This Act is special, and applies to Hamilton County, and was no doubt passed to enable the county to undertake some such contract as is involved in this case.

The Act provides, in substance, that the County Court of Hamilton County may join, and co-operate with any individual, firm, joint stock company, or corporation, in the construction of a combined foot, wagon, and railroad bridge or bridges, across any navigable stream within the county, and may appropriate and contribute, on such terms and conditions as they deem proper, not to exceed $150,000, and that, in order to raise the amount, the County Court might issue the bonds of the county, and provide for their payment, as authorized by the Act, not to exceed $150,000, and not to bear greater rate of interest than five per cent., or run longer than fifty years to maturity. The Act does not require the question to be submitted to a vote of the people of the county. It is said this Act is unconstitutional, because it seeks to extend the credit of the county of Hamilton in aid of the railroad company, without the assent of the citizens of the county by a three fourths vote, and because it seeks to make the county a stockholder in the bridge and right of way with

the railroad company. Both the third and fourth sections of this Act refer to the action authorized by it as "*granting the aid of the county.*" This aid must consist in the bonds of the county, which is but another name for the credit of the county, for it has no money in its treasury.

It is possible that this action might be made constitutional by submitting it to a vote of the people, but this is clearly not the intention of the Act, and the bill in this cause charges that a motion to submit the action of the Court to a vote was made in the County Court and rejected, and no election has ever been held.

The language of the Constitution is: "The credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three fourths of the votes cast at such election; nor shall such county, city, or town become stockholders with others in any company, association, or corporation, except upon a like election, and the assent of a like majority."

It is evident that the letter and spirit of this provision is that the county shall not be a stockholder nor joint owner with any company, association, or corporation in any enterprise or improvement, although it may be one in which the county may be otherwise authorized to enter.

We think it apparent that, under their contract,

the county of Hamilton does loan its credit to the railroad company to enable it to build this bridge, and that it does become a stockholder or joint owner with the railroad company in the ownership of the bridge and right of way.

There is nothing to indicate that the $150,000 of bonds is the cost of the superstructure or wagon way, as separate from the substructure or railway, nor can the former exist without the latter, and the right of the county extends to the foundation and substructure, at least to the extent of an easement, for support and maintenance.

It is not simply the case of the railroad company building the bridge, as the agent of the county and for the county, to be paid for by the county after it is built, but they are engaged in a joint enterprise, and the aid of the county is extended to the railroad, to enable it to consummate the enterprise, by issuing its bonds as a basis of credit for the enterprise. *Garland* v. *The Board, etc.*, 6 So. Rep., 442 (Ala.).

Not only is this so, but the county does become concerned in the matter far beyond its mere interest in the building of the county bridge. This joint agreement contemplates not only the building of the bridge for both railroad and county purposes, but the building of twenty-five to fifty miles of railroad branches, in order to reach coal and iron mines, stone quarries, timber, and the main line of the Cincinnati Southern Railroad Company, and one of

the stipulations is, that the fee simple title to the land covered by the railroad company's right of way for one mile north of the bridge (but not the bridge itself) is to vest in Hamilton County. There is also a stipulation that other railroads may use the railroad bridge, and that coal shall be brought into Chattanooga and its suburbs at a special rate. All of these matters form a part of the consideration for this contract, and the county becomes, to a greater or less extent, interested in them all with the railroad, and it is probable that, but for this aid from the county, the additional roads and other improvements would not be undertaken by the defendant road; and it further appears, from the bill, that ample bridge facilities already exist at or near this same location, so that the building of a county bridge is not the primary object in view.

If we are correct in our construction of this agreement between the county and the railroad, that it is not merely a contract to build a bridge for the county, to be used for county purposes and belong to the county, but that it is a lending of credit to the railroad, and becoming a stockholder and joint owner with the railroad company in the proposed improvements, then we need not consider the Act of 1885, Chapter 149, to which we have been referred, at all, for it relates exclusively to the building of county bridges in certain localities, not in connection with any railroad enterprise, and under its provisions will be found no authority to

loan credit to any company, association, or corporation, or to become jointly interested with such companies.

We need not, therefore, consider whether the latter Act is constitutional or unconstitutional, as, under our construction of the contract in this case, the contemplated issue of bonds would not be authorized by that Act, whether it be constitutional or not.

We are of opinion, that under a proper construction of this contract, or agreement, between the county of Hamilton and the railroad company, the issuance and delivery of the bonds, as proposed, is contrary to the Constitution in the absence of any submission of the proposition to the people of the county, and the decree of the Special Chancellor sustaining the demurrer was correct, and the same is affirmed.

The county of Hamilton and the defendant, First National Bank of Chattanooga, are perpetually enjoined from delivering said bonds to the defendant railroad company, or otherwise negotiating them, and the bonds are canceled, and will be delivered up for destruction.

The county of Hamilton and the railroad company will pay the costs of this Court and the Court below, equally.

94 57
116 376

RUOHS *v.* BANK.

(*Knoxville.* November 8, 1894.)

1. MUNICIPAL BONDS. *Guaranty of validity and solvency.*

The seller of negotiable municipal bonds does not, in the absence of express contract to that effect, incur the liability of a guarantor of their validity and solvency to the purchaser. The proof does not show any express contract of guaranty in this case. (*Post, pp. 61–70.*)

Cases cited and approved: Bank *v.* Oldham, 6 Lea, 718–728; Gowen *v.* Shute, 4 Bax., 57; Crockett *v.* Alexander, 5 Heis., 106; Cross *v.* Sells, 1 Heis., 83; Mathews *v.* Thompson, 2 Heis., 588; Scruggs *v.* Gass, 8 Yer., 175; Ware *v.* Street, 2 Head, 609; Walker *v.* C ark, 2 Leg. R., 42; 92 U. S., 147; 115 U. S., 384; 124 U. S., 545.

2. SAME. *Seller's liability for misrepresentation.*

The seller does not incur liability to the purchaser for misrepresentation in the sale of negotiable municipal bonds, that were, unknown to both parties, void for want of corporate existence of the municipality issuing them, where the seller expressed an honest, though mistaken, opinion in favor of their validity, but falsely represented their desirability as an investment, and the purchaser delayed unduly to rescind the contract of sale after acquiring notice of the facts adversely affecting the validity and value of the bonds. (*Post, pp. 69–74.*)

Cases cited and approved: Knuckolls *v.* Lea, 10 Hum., 577; 93 U. S., 55, 631; 46 Fed. Rep., 727; 149 Mass. (S. C., 2 L. R. A., 743).

3. SAME. *Seller not liable for mutual mistake as to validity.*

The seller incurs no liability to the purchaser of negotiable municipal bonds, where the bonds, supposed by both parties to be valid at date of sale, are declared void in a subsequent suit for their enforcement, by reason of the invalidity of the charter of the municipality. (*Post, pp. 74–76.*)

4. BANKS AND BANKING. *Liability for fraud of officers.*

An incorporated bank is not liable for fraudulent acts of its officers performed in a transaction conducted for their private

benefit, although they may have illegally used the funds and credit of the bank in effecting their purpose. (*Post, pp. 71, 72.*)

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. McConnell, Ch.

Wm. H. DeWitt and Pritchard & Sizer for Ruohs.

White & Martin, Daniels & Garvin, Clark & Brown for Bank.

Wilkes, J. Complainant, Ruohs, bought twenty-two bonds, purporting to have been issued by the town of Athens, Tenn., in aid of the Nashville and Tellico Railroad Company, each for one thousand dollars, and paid for the same $19,800, or at the rate of ninety cents on the dollar. He afterward brought suit against the town of Athens to recover the amount then due him on said bonds, when it was held that the charter of the town of Athens was void, and its bonds, as a consequence, were invalid and void, even in his hands as a *bona fide* holder for value, and relief was denied him. See the case of *Ruohs* v. *Athens*, 7 Pick., 20.

The present bill is filed to hold the defendants, Third National Bank of Chattanooga, W. E. Bas-

kett, its cashier; W. H. Hart, vice president, and the representatives of Jno. A. Hart, its president, liable for said bonds.

The grounds upon which it is sought to hold the defendants liable are guaranty, "express and implied," fraudulent misrepresentations, and mutual mistake, in the sale of the bonds to Ruohs, in which it is charged the bank, as a corporation, and its officers, as individuals, participated.

Much proof was taken, and, on the hearing, the Chancellor denied complainant any relief, and dismissed his bill, from which he appealed, and has assigned errors.

There is no controversy but that complainant is a *bona fide* purchaser of the bonds, for full value, and without actual notice of their invalidity; that he paid the sum of $19,800 for them, and that there is a total failure of consideration in the fact that the bonds are invalid and void.

Complainant's view of the case is, that he was a patron of the defendant bank, kept a large amount of money on deposit in it, had the utmost confidence in its officers, and trusted largely to their representations and statements in his business matters.

He was approached by John A. Hart, the president, with an offer to sell him the twenty-two bonds, and, knowing nothing of them, he sought the advice of Hart, and inquired specially as to the solvency and validity of the bonds, and was assured by Hart that they were regular and valid, that the officers of

the bank had made an investigation at Athens and found the bonds were all right, and they would prove a good investment and be worth a premium. Hart represented that he would be glad to buy them himself if complainant would lend him the necessary money. He further represented, that the bonds belonged to a Louisville party, and the bank was only interested in selling them for a commission. Similar inquiries were made of the cashier, Baskett, and vice president, W. H. Hart, and they also assured complainant that the bonds were good. Complainant, relying upon these representations, made no further inquiries, except to consult legal counsel whether the bonds were regular on their face.

Complainant charges that the Harts and Baskett conspired together to mislead him; that they had already bought the bonds for seventy-two and one half cents on the dollar, and sold them to complainant for ninety cents, and this was done with the intention, afterwards consummated, to appropriate and divide the profits.

The bank filed a demurrer, and demurrers were also incorporated in the answers of the officers as individuals. The bill was amended so as to charge, more distinctly, conspiracy on the part of the bank and its officers to defraud complainant, and that the defendants acted for the bank as well as for themselves, and that the spoils were divided between the bank and the officers.

A second demurrer was filed by the bank, set-

ting up, among other grounds, that the act, as charged, was *ultra vires* so far as the bank was concerned. This demurrer was overruled, with liberty to rely on the same in answer.

It is insisted, with great earnestness and zeal, that the Chancellor erred in refusing to grant the relief asked against each and all of the defendants. The grounds on which complainant bases his claim to relief are, in substance:

First.—That the officers and bank guaranteed the validity and solvency of the bonds by express stipulation; and if this cannot be maintained, such guaranty will be implied from the transaction itself.

Second.—That the officers of the bank made false and fraudulent misrepresentations in regard to the bonds and their validity and solvency, upon which complainant relied, and for which he is entitled to hold both the bank and the officers liable to the extent of the bonds, or at least the amount paid for them.

Third.—If neither of these contentions can be maintained, still complainant can hold both the bank and its officers for the full amount paid for the bonds, on the ground of mutual mistake of the parties in dealing with the bonds, which had no legal existence, and which proved to be utterly void.

It appears that when the bonds were issued by the town of Athens, they went into the hands of R. L. Bright, president of the railroad company, and were by him hypothecated—one half with the First

National Bank of Athens, and the other half with the Bank of Fayetteville, Tennessee.

About the first of November, 1888, while Bright was in New York, he sold the bonds to a party to him then unknown, but represented by Defendant Baskett. He had previously been negotiating for a sale of the bonds with Jno. A. Hart and Baskett. He states that he did not know the bank at all in the transaction; that the negotiations were made with Jno. A. Hart and Baskett, and, if the bank had any connection with it, he did not know it. He further states, however, that when he returned, a memorandum was presented to him, showing how the proceeds had been applied, and that $354.75 of the proceeds had been applied as a credit on a note he owed the bank individually, and that this amount, together with the amounts paid the Athens and Fayetteville banks, and a commission to Baskett of $159.50 (or one per cent.), consumed the proceeds of the sale—$15,950.

He cannot account for this $354.75 transaction, except by saying that Hart and Baskett, having possession of the money, and being officers of the bank, had it credited upon his note to the bank, and he accounted for the same to the railroad company.

He states, in a second deposition, that he knew the bank only as a collecting agent, and did not know it had any interest in the purchase, but supposed he was selling to Baskett and Hart, and possibly other parties than the bank, otherwise he would

probably not have sent the bonds to the bank for collection. Instructions were given to the Athens bank to turn its bonds over to Baskett, and the Fayetteville bank's bonds were sent to the defendant bank for collection from Baskett and associates, if any.

Baskett's testimony is that he bought the bonds for Jno. A. Hart, and the bank was not interested in the purchase in any way or to any extent, and had nothing to do with the sale to the complainant, and received none of the profits of the sale.

It appears that Fisher, the cashier of the Athens bank, on November 9 went to Chattanooga to get his money for the bonds held by his bank as collateral, and was told by Baskett that the bonds had been sold, but that the party buying could not complete his financial arrangements for a week; that the bank was then quite close, otherwise it would loan the purchaser the money to take up the bonds; and, thereupon, on Fisher's suggestion that his bank did not need the money, but wanted to close the transaction, and would take a six months' certificate of deposit, without interest, on the Chattanooga bank for the amount due it, Baskett agreed to give, and did deliver to Fisher, the bank's certificate of deposit for the amount due him.

The bonds, as a matter of fact, were not at that date sold to complainant, and not until November 26. In the meantime, on November 21, 1888, the following letter was sent to complainant by John A. Hart, to-wit:

"CHATTANOOGA, TENN., Nov. 21, 1888.

"This morning I received permission to sell the bonds I offered you at ninety cents net. If I had the money, I would prefer buying them myself. If you would loan me the money one year, at seven per cent., and take them as collateral, I would like to do so, but if not, and you still wish them, please call at the bank and I will let you have them, or, if you prefer, I will bring them over to your house. I must have a final answer Friday morning at 10 o'clock. Please answer.

"Yours very truly,

"JOHN A. HART."

Complainant states that the negotiations were made with him for sale of the bonds mostly at the banking house, and were conducted sometimes between complainant and John A. Hart, and at other times between complainant and Baskett, and again between complainant, Baskett, and John A. Hart, and once or twice, pending the negotiations, W. H. Hart talked with complainant about the bonds and the pending sale. The trade was finally consummated in the president's room in the bank.

It also appears that W. H. Hart, at the instance of John A. Hart, went to Athens to investigate the bonds, and interviewed Ivins, the mayor, for information. His version is, that Ivins told him some citizens had talked about enjoining the bonds, but that all difficulty had been removed, and W. H. Hart reported this to John A. Hart and Baskett.

Ivins says he stated to Hart that there was much feeling in the community about the bonds, and much talk of contesting their validity.

A few days thereafter John A. Hart wrote to Ivins in regard to the bonds, who, instead of replying, wired John A. Hart that he would come to Chattanooga and meet him at the Read House. They met, and Ivins says he put John A. Hart specially on his guard, that the bonds would be contested, and that he had reliable legal advice that they could be successfully resisted, and steps were about to be taken to that end.

Complainant had not bought the bonds at that date, and of this interview and conversation he had no information until after this bill was filed. It also appears that, after the bonds had been bought by complainant, John A. Hart, upon one occasion, in a saloon, over a glass of beer, stated that he would go on record as the only man that had ever beaten Joe Ruohs, but refused to explain what he referred to.

Complainant states, generally and repeatedly, that John A. Hart and Baskett both represented to him that they had investigated, and the bonds were valid; that Hart called at his residence, and pressed him to buy; said the bonds were worth par, represented that he was selling for a Louisville party, orally guaranteed the validity and solvency of the bonds, and withheld from him the information he had received from Ivins. He is emphatic that Hart

and Baskett purported to be acting for the bank, which was to receive a small commission only for its services. Complainant has no other than his own testimony to sustain this insistence of an oral guaranty, and we are constrained to believe, from the entire record, that this contention is not maintained, even upon complainant's own theory and version of the transaction. It is not at all probable that complainant, if he had desired a guaranty, would have been content with an oral one in a matter of this magnitude, and to run for twenty years, but he would have demanded a written one. It is not at all reasonable, that if the officers were negotiating for the bank, as complainant states, they would have been willing to guarantee the bonds individually. It is not at all reasonable, if they were professing to act for Louisville parties, merely for a small commission, that they would have been willing to give their personal indorsement to effect the trade; and if they contemplated perpetrating a fraud, as complainant charges, they would not have been willing to make a guaranty that they, in a very short time, would probably be called on to make good. This is looking at the matter from complainant's standpoint.

From defendant's point of view, it appears that John A. Hart is dead, and we cannot have his testimony. W. H. Hart, Baskett, and D. E. Reese all deny emphatically that such guaranty was made, though complainant states that the guaranty was made or repeated in their presence.

If there had been such guaranty, complainant, when the validity of the bonds was first questioned, would, most likely, at once have tendered them back, and enforced his guaranty. The result is, complainant must fail, both as to the bank and the individual defendants, so far as he relies upon an *express guaranty*, in the absence of proof of such *express guaranty*.

The question next arises, what is the liability of the seller or assignor of such bonds, and is there any implied warranty or guaranty?

The case is very similar to that of *Otis* v. *Cullom*, 92 U. S., p. 147. That case was this: The city of Topeka, Kansas, under two Acts of the Legislature, issued $100,000 of municipal bonds. They became the property of the First National Bank of Topeka. The bank sold $18,000 of them to the plaintiff in error. The interest was defaulted and suit was brought. It was held that the bonds were void because the Legislature had no power to pass the enabling Acts. Thereupon the vendee sued the receiver of the vendor bank to recover the amount paid for the void bonds. Held, that the holder of the void bonds could not recover. The Supreme Court says: "Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand, like bank notes. The seller is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries.

Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him. It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principles which the plaintiff in error insists shall be applied in this case." See also *Bank* v. *Burgen County*, 115 U. S., 384; *Etna Life Insurance Co.* v. *Middleport*, 124 U. S., 545; Jones on Corporate Bonds and Mortgages, Sec. 220.

The doctrine of *Otis* v. *Cullom* is recognized, and the case approved, in *First National Bank* v. *Oldham*, 6 Lea, 718–728.

The same doctrine is recognized and applied by this Court where a note was given for worthless "Mississippi cotton money." *Gowen* v. *Shute*, 4 Bax., 57.

And, again, contracts based upon illegally issued Bank of Tennessee money were upheld by this Court. *Crockett* v. *Alexander*, 5 Heis., 106.

So, transactions had with Confederate money, after it was worthless, were sustained. *Cross* v. *Sells*, 1 Heis., 83; *Mathews* v. *Thompson*, 2 Heis., 588.

So, payment in worthless bank bills was held binding, and operated as a satisfaction of the debt. *Scruggs* v. *Gass*, 8 Yer., 175. In this case, Judge Catron, in delivering the opinion of the

Court, says: "To adopt a different rule would end in much litigation and confusion. Scruggs could recover from Gass; the latter, of course, could have his remedy against the person from whom he received the paper, and, by this means, it would be traced back by suits to the holder at the period when the bank refused specie payment; * * * a rule which, if adopted, would threaten endless strife and litigation." Thus resting the case upon the same reason given by the United States Supreme Court in *Otis* v. *Cullom*, in 92 U. S., hereinbefore cited. To the same effect is the case of *Ware* v. *Street*, 2 Head, 609.

So, where a party assigned a note for land (void on its face for usury) without recourse, held, in the absence of fraud and deceit, that there was no implied warranty or right to recover upon the original consideration. *Walker* v. *Clark*, 2 Leg. R., 42.

A different rule prevails in many cases, in regard to such securities as these, from the rule governing the transfer of private bills and notes, and the distinction and reason for it is clearly pointed out in Tiedeman on Commercial Paper, Sec. 244, pages 404, 405.

We are of opinion complainant cannot hold the defendants liable on the idea of an *implied warranty or guaranty* of the validity or solvency of the bonds.

Can the defendants be held liable on the grounds of fraudulent misrepresentations or mutual mistake? It is proper to keep in view in this case that the

cause of the loss was the invalidity of the bonds, because the town of Athens had no corporate existence, and hence no power to issue the bonds.

We are thoroughly satisfied in this case that misrepresentations and false statements were made to the complainant in the course of these negotiations by John A. Hart; that false impressions as to the desirability of the bonds and their value were made by said John A. Hart; and that the conduct of Baskett and W. H. Hart, especially the former, was calculated to, and did, mislead the complainant in deciding upon the desirability of the bonds.

The complainant was induced to believe that the bonds were the property of a party in Louisville, and that Hart and Baskett were simply trying to place them, and had no interest in them except a small commission, when, at the very time, Hart, through Baskett, had already bargained for the bonds at seventy-two and one half cents, and, without paying for them himself, was negotiating to sell them at ninety cents to complainant, with a view of appropriating the profits to the use of himself, Baskett, and W. H. Hart, which he afterward did, and Baskett and W. H. Hart connived at, and aided, so far as opportunity offered, in carrying this scheme into effect.

In doing so, Jno. A. Hart, principally, and Baskett and W. H. Hart, in a subordinate manner, made representations as to the desirability of the bonds, and their value, which were not warranted by

the facts. To some extent they concealed from complainant certain facts concerning the status of the bonds at Athens, and concealed from him the fact that there was a considerable feeling of opposition to them, and a disposition to contest and avoid them; but we are satisfied the parties did not know the bonds were invalid for the reasons and upon the grounds afterward held by the Court, and did not fraudulently misrepresent to complainant facts connected with their validity which were only developed by the subsequent suit, and made vital by the determination of this Court.

There can be no doubt but that the two Harts and Baskett co-operated in the transactions which resulted in the sale of the bonds, and were, to some extent, if not equally, concerned in the representations made. We are satisfied that the bank, as a bank, was not a party to the transaction or the misrepresentations, but it is apparent that the Harts and Baskett were using the credit and funds of the bank, and their connection with it, to further their individual scheme to effect the sale, and divide the profits among themselves, which they did, the bank receiving no part of it, not even the commissions.

The certificate of deposit given to Fisher, the cashier of the bank at Athens, was wholly unwarranted, and did not represent an actual deposit of money in bank, and was not a real bank transaction, but a simulated one, in order to obtain credit, and carry the bonds for Jno. A. Hart until the individ-

uals could unload them. The cashing of the checks handed over by complainant when he paid for the bonds, was, in effect, the same kind of a transaction, and all the details are such as these individuals had the opportunity to execute by virtue of their official connection with the bank, and which they did all the while for themselves, and not for the bank. Complainant says he was dealing with the bank, and doubtless he so believed; but the facts did not sustain this contention, and his belief cannot change the facts as they exist.

We see no tenable ground on which complainant can hold the bank in any event or for any reason.

Very serious obstacles arise in the way of complainant in holding the officers liable as individuals. The first is complainant's persistent statement that he dealt with the bank, and not with the individuals, and that the bank is liable to him because the individuals acted *for the bank*. Another is the fact that, after ascertaining the trouble with the bonds, he saw proper to hold on to them and attempt to enforce them against the maker for their full face value, instead of returning them to the defendants and seeking to hold them liable for the price paid.

Tiedeman, in his work on sales, lays down the rule of law in such cases as follows: "It is also necessary that the defrauded party should do nothing, after the discovery of the fraud, which would in any way admit the existence and validity of the contract. Such an admission, if clear, will operate as a bar

to his right of rescission for fraud; for example, it would be fatal to his right to rescind where he has mingled the property with his own, or offered it for sale, or in any other way exercised any rights of ownership over the goods." Tiedeman on Sales, Sec. 163.

Here, however, is a case *in equity* where promptness and diligence are far more essential and material. *Donaldson* v. *Farwell*, 93 U. S., 631; *Grymes* v. *Sanders*, 93 U. S., 55; *Johnston* v. *Standard M. Co.*, 148 U. S., 366; *Knuckolls* v. *Lea*, 10 Hum., 577.

Mr. Pomeroy states the rule as follows: "All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence, to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself, with reference to the transaction, as though it were still subsisting and binding, he thereby waives all benefit of, and relief from, the misrepresenta-

tions." 2 Pomeroy's Eq. Jur., Sec. 897 (2d Ed.); *Deming* v. *Darling*, 149 Mass. (S. C., 2 L. R. A., 743); Cook on S. and S., Sec. 762 and notes (3d Ed.); *Meyer* v. *Richards*, 46 Fed. Rep., 727.

Another difficulty is that the invalidity of the bonds being the cause of the loss, and that not having been ascertained and determined when the representations were made, or even at that time suspected, so far as this record discloses, the parties could not have intended to guard against and cover this defect by their representations. At that time it cannot be held that the parties knew the bonds to be illegal and invalid, and falsely represented to the contrary. Nor can their representations, as made in this record, be held to go to the extent that the bonds were valid, but only that, so far as known or believed, they were valid and authorized. To hold that the parties meant that the bonds could not be invalidated for any reason, would be, in effect, to hold them as guarantors of the bonds, and, as before stated, we cannot so hold under this record. Mere statements in regard to the validity of the bonds involved not questions of fact, but of legal opinion, and the statements, if made, cannot be considered as anything more than expressions of opinion, inasmuch as the fact of validity was not then ascertained and determined.

Much of this reasoning applies to the contention made, that the complainant is entitled to recover because of mutual mistake between the parties. A

mutual mistake as to *an existing fact* is unquestionably ground for relief and rescission—as, for instance, if a horse should be the subject matter of sale, and should be dead when the sale was made, and neither party knew of that fact. But if we are to hold that there is a mutual mistake about the solvency or validity of securities such as these, which are daily sold in the market, and pass from hand to hand by delivery, it would unsettle many transactions to hold that relief could be granted, as each successive vendee could sue his vendor throughout the whole life of the security, merely because it was, after a long lapse of time, discovered that the original issuance of the bonds was irregular or unwarranted, and the evils so forcibly portrayed by Judge Catron would result. Unquestionably, if the invalidity of these bonds had already been determined when this sale was made, and the fact had been fixed, and the parties dealt in ignorance of that fact *as an existing condition of affairs*, there would be room for the application of this principle. Beach's Mod. Equity, 49; Pomeroy's Equity, Secs. 839, 854.

This principle might, with the same consistency, have been invoked in the case of *Otis* v. *Cullom*, or any of the other cases cited, as in this case, and could as well be invoked in any case in which a bond has been or may be held void. After all, the question involved is not one of fact, and any mistake between these parties was not a mistake of fact, but of legal opinion.

If this doctrine could apply at all, it would probably only be between the maker and the first vendee of such securities, on the ground that the maker had received pay for bonds, but had parted with nothing in return, but could not apply between two successive purchasers, each of whom had paid for the bonds, though, it may be, in different amounts.

We think there is no reversible error in the rulings of the Chancellor upon evidence, and do not deem it important to pass, in detail, upon them.

The conclusion is, that there is no error in the decree of the Chancellor, and it is affirmed, with costs.

PETITION TO REHEAR.

WILKES, J. A petition to rehear in this case urges that at least the estate of John A. Hart should be held liable, not only for the misrepresentations made by him to complainant, but also because he *suppressed the conversation* between himself and Ivins in regard to the bonds at the Read House.

A practical difficulty is encountered, at the very threshold of this contention, in the fact that there is no evidence that any false representations were made to complainant by John A. Hart, or any facts were withheld from him by John A. Hart. This arises out of the fact that complainant's testimony is the only testimony on this point, and it was by

the Court excluded so far as it affected the estate of John A. Hart.

The testimony of Ivins as to what occurred between himself and John A. Hart at the Read House is contradictory to other statements made by him to W. H. Hart, and indefinite in its character, and somewhat contradictory in itself.

It does not appear that he told Hart the bonds were invalid for any particular reason, certainly not for the reason for which they were declared invalid afterward, but simply that they would be contested and probably successfully resisted.

The real ground of their invalidity was not then divulged, or even known, so far as this record shows, and Ivins' statement, at best, was only an opinion as to the probable result of a future contest.

It is by no means clear when this conversation took place. Presumably, it was before the bonds were bought by John A. Hart, and this view is sustained by the testimony of W. H. Hart and of Ivins. It is not probable that, after that transaction had been made, John A. Hart would have interested himself in any further investigations of the bonds. It is evident that the communications actually made by Ivins, *whatever they were as a matter of fact*, did not deter Hart from buying the bonds, and from this fact, as well as Ivins' statement made but a few days before to W. H. Hart that the bonds were valid, we are constrained to believe that Ivins did not communicate any existing fact to John A.

Hart calculated to alarm him about the validity of the bonds.

Both W. H. Hart and Baskett prove emphatically that, when John A. Hart bought the bonds, neither he nor they, nor anyone else, so far as they could ascertain, had any suspicion or question of their validity.

The fact that John A. Hart bought the bonds at seventy-two and one half cents, and sold them to complainant for ninety cents, is a fact developed in the record, but this is not urged as a ground of relief.

We see no reason to modify the opinion heretofore expressed, and the petition to rehear is dismissed.

* STATE v. O'BRIEN.

(*Knoxville.* November 10, 1894.)

1. EMBEZZLEMENT. *Statute includes employe of foreign corporation.*

The statute declaring "any officer, agent, or clerk of any incorporated company" guilty of a felony "who embezzles or fraudulently converts to his own use any money or property" of his employer received by virtue of his employment, embraces the employe of a foreign corporation. (*Post, pp. 81–85.*)

Code construed: § 5475 (M. & V.); § 4708 (T. & S.).

Cases cited and distinguished: 22 N. Y., 245; 55 Ga., 236.

2. SAME. *Defense.*

An employe of a foreign corporation cannot defend a charge of embezzlement on the ground that the corporation had not complied with the conditions of the statutes so as to have the right to acquire, hold, collect, or pay out money in the State. (*Post, pp. 81–85.*)

Act construed: Acts 1891, Ch. 122.

3. ESTOPPEL. *Applied in criminal cases.*

The rule of estoppel may be applied in criminal as well as in civil cases. (*Post, pp. 82–85.*)

Case cited: 24 Kan., 1.

FROM HAMILTON.

Appeal from Circuit Court of Hamilton County. JOHN A. MOON, J.

W. J. CLIFT, CLIFT & CANTRELL, and C. MARCHBANKS for O'Brien.

* Reported in 26 L. R. A., page 252.—REPORTER.

Attorney-general PICKLE for State.

W. D. BEARD, J. The defendant was indicted for embezzlement. He was the Supreme Treasurer of the Supreme Council of the Catholic Knights of America, a corporation organized under the laws of Kentucky, but doing business in Tennessee. It is charged in the indictment, that, while acting in this official capacity, he collected in Hamilton County, in this State, the sum of $75,000 for his principal, and that he had "unlawfully, fraudulently, and feloniously, and with the intent to defraud and deprive the true owners thereof," appropriated and converted this sum to his own use.

After a number of continuances, the defendant presented a plea to this indictment, which is styled by him, and has the form of, a plea in abatement. In this plea the defendant says the indictment ought not to be maintained because the Supreme Council of the Catholic Knights of America was a foreign corporation, and that it had not, at any time, filed in the office of Secretary of the State of Tennessee a copy of its charter, and caused an abstract of the same to be recorded in the office of the Register of Hamilton County, as required by the Act of the Legislature passed March 21, 1891, and approved March 26, 1891, and that, having failed of compliance with the requirements of that Act, it was wrongfully carrying on business in this State, and could neither acquire, hold, collect, nor pay out moneys in this State, and, therefore, the defendant could not be

liable for embezzling or appropriating the funds of this corporation.

The Attorney-general moved the Court to strike out this plea, because, among other reasons, it presented no meritorious defense to the indictment. This motion was overruled by the trial Judge, and, the State declining to take issue on the plea, it was sustained, and the defendant was discharged.

From this judgment the State has appealed, and has assigned for error this action of the Court below.

The indictment in this case rests on § 5475 of the Code (M. & V.) of Tennessee. It is unnecessary for us to analyze this section. It is enough to say that its terms are broad enough to include the employes of a foreign corporation, and the facts alleged in the indictment, being proved, would warrant a conviction, unless it be that this plea in bar offers a sufficient defense. The question, then, presented here is, Is it a good plea? We have no hesitation in saying it is not. Conceding that this corporation, organized, as is averred in the indictment, for benevolent purposes, is within the Act of 1891 (and this we do not now determine), yet, if it should turn out in proof that the defendant, while acting as agent and employe of it, received money paid to him for his principal in the course of his employment, and then feloniously and fraudulently appropriated it to his own use, when indicted for the offense, he cannot be permitted to defend himself from the criminal consequence of such wrongdoing

upon the ground that his principal was carrying on its business in this State in violation of the terms of that Act. Upon the plainest principles, having assumed to receive this money for his non-resident principal, he is concluded, both civilly and criminally, by this assumption. Whatever others might say about the right of this foreign corporation to come into this State to carry on its business and acquire property interests without having first complied with the requirements of the Act of 1891, at any rate the defendant's mouth is closed when, as agent, he receives the money of and for this corporation, and feloniously appropriates it to his own use. The wrongful act of the principal cannot be invoked as a protection against the still more wrongful act of the guilty agent. To him, under such circumstances, the rule of estoppel applies. On this subject, the case of *State* v. *Spalding*, 24 Kansas, 1, is very instructive. In that case Spalding was city clerk, and the money which he was charged with embezzling came from license fees collected by him. Under the ordinances of the city, the license fee was payable to the city treasurer, who issued a receipt therefor, upon the production of which the sole duty of the city clerk was to make out and attest the license, which was then signed by the mayor. The duty of this clerk was purely clerical, and he had nothing to do with the money. The fact was, however, he collected from numerous licensees the money due on the delivery of their licenses. Having fraudu-

lently appropriated these moneys, and being indicted for embezzlement, he undertook to defend upon the ground that, as his receipt of these moneys was unauthorized and outside the line of his duty, they were not the moneys of the city, but of the various licensees, and that, therefore, the indictment for embezzlement of the city's funds could not be maintained. To this contention, however, the State replied: "A man may not say, 'I have the right to receive money,' and receive it, and then, when challenged for its receipt or embezzlement, avoid liability by saying, 'I had no right to receive it.' He has voluntarily assumed a position the responsibilities of which he cannot avoid. The defendant may not say he holds this money simply for the licensees, because he himself has issued the licenses, which he might rightfully issue only when the city had received the money; that by issuing he conclusively, so far as he was concerned, affirmed that the money he had received and was holding was city money. The law of estoppel binds him, whether it binds anyone else or not, and is equally potent in a criminal as well as a civil action."

The Courts adopted this view, and said, through Judge Brewer delivering the opinion: "We hold that when one assumes to act as agent for another, he may not, when challenged for these acts, deny his agency; that he is estopped, not merely as against his assumed principal, but also as against the State; that one who is agent enough to receive money is agent enough to be punished for embezzling it."

Mr. Wharton, in his work on Criminal Law (9th Ed.), Vol. 2, Sec. 1328, recognizes this rule of estoppel in its spirit, if not in form. He says, upon the authority of cited cases, "it is no defense that the principals have no right, as against third parties, to the money which the servant embezzles, or that their title was wrongful. If he fraudulently take it on their account, and then embezzle it, the offense is complete. Nor is it any defense that the money embezzled was the proceeds of the sale of liquor kept in violation of law."

Bishop, in his work on Criminal Law (3d Ed.), Sec. 367, distinctly suggests the rule of estoppel as one proper for adoption in criminal jurisprudence. He says: "In reason, whenever a man claims to be a servant while getting into his possession, by force of his claims, the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply in the criminal?"

Without further discussion, we are content to adopt this rule of estoppel, so long recognized in the civil courts, as a proper one for enforcement in the criminal courts of this State, believing, as we do, that it rests on sound reason, and is supported by the weight of authority of eminent respectability.

It is proper to add that an examination of the two cases relied on by the defendant discloses nothing in conflict with the conclusion reached by us.

Neither of them involves the question of estoppel. In neither was it raised, nor could it have been. Both involve the construction of local statutes, and nothing more. In the first of these cases (*Coates* v. *People*, 22 N. Y., 245) the Court simply held that the statute under which the defendant was indicted was passed for the prevention of the embezzlement of the funds of private persons and corporations, and, therefore, would not sustain an indictment for the embezzlement, by an employe, of the funds of a public corporation. In the other of these cases (that of *Cary* v. *State*, 55 Ga., 236) the cashier of a branch office, located at Atlanta, of a foreign corporation — the Freedman's Saving and Trust Company—was indicted for embezzling funds of this corporation committed to his charge, and the Court held that the indictment could not be maintained, because the statute on which it rested was framed for the protection of banks chartered by the State, and that it did not include a foreign corporation exercising the franchise of banking in Georgia without the authority of the laws of that State.

As we have already said that § 5475 of the Code is broad enough in its terms to include an act of embezzlement by an agent of a foreign corporation, it is apparent that these cases do not militate against either the premise or the conclusion of this opinion.

The case is reversed, and remanded for further proceedings.

CRANE *v.* STATE.

(*Knoxville.* November 12, 1894.)

1. SUPREME COURT. *General objection to evidence.*

A general objection to evidence will not be noticed by the Supreme Court. (*Post, pp. 89, 90.*)

Cases cited and approved: Railroad *v.* Fleming, 14 Lea, 129; Baxter *v.* State, 15 Lea, 657; Iron Co. *v.* Dobson, 15 Lea, 409; Druggist Cases, 85 Tenn., 449; Powers *v.* McKenzie, 90 Tenn., 167; Railway Co. *v.* Beeler, 90 Tenn., 548; Graham *v.* McReynolds, 90 Tenn., 674; Miller *v.* State, 12 Lea, 223.

2. SAME. *Refusal of first application for continuance.*

It is not reversible error for the Court to refuse the defendant in a felony case a continuance at the first term, over his general affidavit averring absence of several witnesses whose testimony he desired, when he does not deny his guilt or indicate any defense to the charge, either in his affidavit or upon the trial. (*Post, pp. 90, 91.*)

3. BIGAMY. *Proof of first marriage.*

In prosecutions for bigamy proof of the fact of the first marriage in another State, and of the validity and regularity of such marriage under the laws of that State, is sufficiently made, in the absence of explanatory or countervailing evidence on the part of defendant, by the oral testimony of bystanders proving the performance of a marriage ceremony between defendant and the woman named as his first wife, and by proof of subsequent cohabitation of the parties, and of defendant's admission of the fact of such marriage. (*Post, pp. 90, 93.*)

Code cited: § 5651 (M. & V.); § 4841 (T. & S.).

Case cited and approved: 52 Mo., 84.

Cited and distinguished: Bashaw *v.* State, 1 Yer., 177.

4. SAME. *Acknowledgment of marriage.*

Any admission by defendant of the fact of marriage, by words or conduct, in the presence of one or more persons, is sufficient,

under that provision of the statute making "the testimony of any bystander who witnessed the ceremony and the public acknowledgment of the party charged" competent evidence of both marriages in prosecutions for bigamy. (*Post, pp. 93, 94.*)

Code construed: § 5651 (M. & V.); § 4841 (T. & S.).

Case cited and approved: Finney *v.* State, 3 Head, 546.

5. SAME. *Defendant's knowledge that first wife was alive. Charge.*

It is not error for the Court to charge, in a bigamy case, that defendant is guilty if he either knew, or had good reason to believe, that his first wife was alive at the date of his second marriage. (*Post, pp. 95–97.*).

FROM KNOX.

Appeal from Criminal Court of Knox County. T. A. R. NELSON, J.

J. H. WELCKER, H. H. INGERSOLL, and J. F. J. LEWIS for Crane.

Attorney-general PICKLE for State.

WILKES, J. The defendant, Crane, was indicted for bigamy, convicted, and sentenced to three years imprisonment in the State penitentiary, and has appealed to this Court.

Defendant was married, July 3, 1894, to an estimable lady in the city of Knoxville, Tenn., by a regularly ordained minister of the gospel, and under a legal license. This fact is proven by the minister who performed the ceremony, and by a certified copy

of the license, and the return indorsed upon it, and is not denied or questioned in any way.

The State's contention is, that at the time of this marriage defendant already had a wife living in Alexandria, Virginia, to whom he was married about eight years ago, and who is still living. It is contended, in his defense, that there is no sufficient proof of the first marrriage.

Mrs. Mary Crane testifies that she is a sister of James Peverill, the father of the first wife, and also connected by marriage with the defendant; that the defendant came to her home in Alexandria, Virginia, about eight years ago upon a visit, and remained some six months or more; that her niece, Addie C. Peverill, a girl sixteen years of age, was visiting at her home at the same time, and the two became intimate. Defendant afterward came to Knoxville. A few months thereafter, the witness wrote to defendant to come back to Alexandria and marry the girl, to which he replied that he did not have the money. Whereupon, witness sent him the money, and he went back to Virginia and married the young lady, in the witness' house, and in her presence, and lived with her a few days at witness' home after they were married, occupying the same room as husband and wife.

About five or six days after the marriage a child was born to the wife. Witness states negatively that defendant never made any claim that the child was not his. He left immediately thereafter, and

came to Knoxville, where he has been ever since. The witness further states that the reason she desired defendant to marry the girl was that he had seduced her sometime before the marriage while at her home. She also testified that the wife, Addie, was alive July 3, 1894, when witness left Alexandria, and had, ever since her marriage, lived with her father in Alexandria.

The father of Addie testifies that he was present and witnessed the marriage of defendant and his daughter at his sister's house; that defendant lived with her only five or six days, and that she has been since living with him; that defendant left and came to Knoxville, and that he and his daughter were all the time aware that defendant was living in Knoxville. He also states that defendant confessed to him since he came to Knoxville, recently, and since the second marriage, that he knew he had a living wife when he married the second time. He also testified that his daughter was alive when he left Alexandria July 3, 1894, and had never been divorced from defendant.

The testimony of both these witnesses was objected to in the Court below, but the ground of objection does not appear in the record. It has been repeatedly held that in criminal, as well as civil, cases a general objection in the Court below, without assigning any reason therefor, will not be noticed in this Court. *Railroad* v. *Fleming*, 14 Lea, 129; *Baxter* v. *The State*, 15 Lea, 657; *Iron Co.* v.

Dobson, 15 Lea, 409; *Druggist Cases*, 1 Pickle, 449; *Powers* v. *McKenzie*, 6 Pickle, 167; *Railway Co.* v. *Beeler*, 6 Pickle, 548; *Graham* v. *McReynolds*, 6 Pickle, 674; *Miller* v. *The State*, 12 Lea, 223. The reason is, that the opposite party may be given the opportunity to act advisedly, and not be entrapped into error after it is too late to remedy the matter by introducing other evidence, which might be done if specific objection was made.

Defendant was indicted October 11, 1894, and gave bond for his appearance from day to day, and, on October 16, 1894, made an application for a continuance, supported by affidavit. The application was denied, and the defendant was put on his trial at once, and convicted.

He moved for a new trial, but the grounds of motion are not stated, and it is not supported by any affidavit. It was overruled, and defendant appealed.

It is insisted that the trial was unduly hastened, and that a continuance should have been granted. Looking to the defendant's affidavit for a continuance, it appears that he gives the names of several witnesses whose testimony he desires, and could obtain if a continuance should be allowed; but he gives no intimation of what he expected to prove by them, which, however, might have been waived on the first application. But he nowhere states that he is innocent of the charge; does not deny either marriage, or state that he believed his first wife to be dead when he entered into the second

marriage; in short, no fact is stated tending to show, either directly or indirectly, his innocence, or that he had any defense whatever. It was not error in the Court to refuse a continuance under these circumstances, even on a first application.

It is insisted that the first marriage is not sufficiently proven. The contention is, that marriage, in cases of prosecution for bigamy, cannot be proven by bystanders who witnessed the ceremony, unless such bystanders also *prove the official character of the person who performed the ceremony, and that the marriage was legal under the law of the place where it was celebrated*, and according to the requirements of that law, and neither can it be proven by any private confession of the defendant, even though proof of cohabitation should also be made out, which it is insisted is not done in this case. While there is a very great conflict of authority in the decisions of different Courts, as to what evidence is competent and sufficient proof of marriage in the absence of statutory regulation, yet all the Courts are agreed upon certain facts as sufficient.

Mr. Bishop says: "The common course of proof is to present the record evidence, and with it evidence to identify the parties, and these are *prima facie* sufficient. The testimony of persons present at the marriage is good evidence without the record, though the absence of the record may, under some circumstances, create suspicion." Bishop on Statutory Crimes, Sec. 610.

In the case of *Miles* v. *The United States*, 103 U. S., 304 (26 L. Ed., 481), the Supreme Court of the United States held, that on an indictment for bigamy the first marriage may be proven by the admissions of the defendant, and it is for the jury to say whether what he said was an admission that he was actually and legally married, according to the laws of the country where the marriage was solemnized. See 3 Rice on Evidence, Secs. 513, 514, 515; 1 Roscoe Crim. Ev. (8 Am. Ed.), 454.

In *Taylor* v. *The State*, 52 Mo., 84, the Court said: "In some States it has been held when, in a criminal case, it was found necessary to prove a marriage in order to convict a defendant of crime with which he is charged, that all the essentials to a valid marriage must be strictly proved, as well as the law of the State or country where the marriage was celebrated, and also that the admissions of the defendant's cohabitation and reputation were not sufficient evidence of such marriage. But experience has proven that such a rule in the United States amounts, in a large number of cases, to a denial of justice. Our people are migratory in their habits, and very many of our foreign-born citizens were married in countries where they were born. To prove a marriage which was celebrated in Bavaria, or even Canada, within the rule adopted in some cases, is oftentimes an impossible task. Doubtless on account of this difficulty, the rule has been modified, and the better doctrine now is that cohab-

itation, reputation, and admissions are sufficient evidence of a legal marriage to submit to a jury. See the case reported in 2 Hawly's Am. Crim. Rep., 17."

Bishop, in his work on "Marriage, Divorce, and Separation," Vol. I., Sec. 1119, says: "We have, congregated in the United States, immense masses of refugees from poverty and oppression in the Old World, not to speak of our States being foreign to one another as to this class of law, and if, whenever a foreign marriage is to be proved, the foreign law must be shown as a separate fact, there can be no end to the useless trouble which Courts and litigants will have in these cases, or the failures of justice therefrom."

This author's conclusion is that, whenever two apparently marriageable persons enter into a contract or go through a form of solemnization which purports to be a marriage, and nothing is presented to throw discredit on the proceedings, the foreign law will be presumed *prima facie* to make the marriage legal.

We have a statutory regulation of the matter.

The Code (M. & V.), § 5651, provides: "In all trials under the preceding sections, a certified copy of the marriage license, and return of the person authorized to solemnize the rites of matrimony, shall be sufficient proof of either the first or second marriage, and, in the absence of such certified copy, the testimony of any bystander who witnessed the mar-

riage ceremony, and the public acknowledgment of the party charged, shall be competent evidence as to both of said marriages."

Criticism is directed to the term "public acknowledgment of the party charged," and it is insisted that this means some acknowledgment before a Court or other public tribunal. We do not so construe the law, but any acknowledgment of the fact of marriage, by confession or conduct, in the presence of one or more individuals, would answer the requirement of the statute. It need not be in the shape of a public avowal, made in the Courts, or in the market place, or from a house top, but can be made as well by acts and conduct recognizing the marriage, as by oral statements to third persons. See *Finney* v. *The State*, 3 Head, 546.

It is said the proof is not sufficient to show that defendant knew his first wife was alive when he married the second time. It appears that he left his first wife within five or six days after the marriage, and came to Knoxville, while she remained in Alexandria, where he married her, and at her father's home. It is not shown by his affidavit for continuance that he was ignorant of the fact that she was still alive, nor does such fact appear upon the motion for a new trial. The defendant introduced no proof whatever, but the father of the first wife states that defendant told him recently, before the trial, that he knew his first wife was alive when he married the second time, and this is nowhere contradicted.

It is not necessary that direct *proof of knowledge* should be made. This, in many cases, would be impracticable, but it may be shown by facts and circumstances, and certainly by the defendant's own confessions.

The Court did not, therefore, err in charging that defendant was guilty, if he knew that his former wife was living, *or had good reason to believe she was alive when he made the second marriage.* See Code (M. & V.) § 5650. There is nothing in the holdings in this case in conflict with the case of *Bashaw* v. *The State*, 1 Yerg., 177. In that case there was a *sharp contest* over the question whether the first marriage was a *common law marriage* or a statutory marriage, and whether the former was a valid and legal marriage under the laws of Tennessee. It was made to appear, by proof, in that case, that Benjamin Bashaw and Sally Cole appeared in the County of Davidson, before Isaac Walton, a Justice of the Peace of Sumner County, and mutually agreed to take, and did take, each other for husband and wife, and Isaac Walton pronounced them to be husband and wife. It affirmatively appeared that Walton had no license to marry the parties, and that he was a Justice of the Peace of Sumner County, and not of Davidson County, when he performed the ceremony. The Court held, upon this proof, that the marriage was a common law marriage, and was not valid, and would not support a conviction for bigamy. In commenting upon the Act of 1820, which is sub-

stantially the same as the present statutes (M. & V. Code, §§ 5650, 5651), the Court said: "It is not intended here to convey the idea that the bystander shall prove that he saw the marriage license in the actual possession of the Justice of the Peace, or that he read it, and the indorsement upon it, with the signature of the Justice of the Peace, and that the license and certificate were genuine and authentic papers, but he must give such testimony respecting these particulars, together with the performance of the ceremony, as will enable the jury to be satisfied that the marriage ceremony was actually performed under the authority of a regular and genuine license, by a person duly qualified to solemnize it.

As applied to that case, where all the facts connected with the marriage were brought out in the proof, and a sharp contest and controversy was made, both on the facts and law, as to whether that marriage was valid or not, or whether the prerequisites to a valid marriage were complied with, the holding was correct. But in this case no contest is made; no objection was made, so far as the record shows, on account of the failure to produce the license or to prove that the party officiating was not regularly authorized to perform the ceremony. *No evidence to impeach the apparent regularity of the proceeding is given, and no explanation is offered whatever.*

If defendant had a real defense growing out of any irregularity or invalidity in this proceeding, it

was within his power to make it known and to point out the defects; but we have absolutely no explanation, and no countervailing proof in the case, but only the testimony as to the ceremony, the subsequent cohabitation, which, together with the ceremony, amounts to acknowledgment, and his subsequent confessions and statements to the girl's father of the marriage.

We are of opinion that, from this record, in the *absence of any contradictory* evidence, the fact and legality of the first marriage is sufficiently proven, as well as the fact that defendant knew his first wife was alive when he made the second marriage, and that there is no error in the charge of the Court. In so holding we do not intend to be understood that the failure of defendant to testify can in any way prejudice his case, nor that the law will *presume* the legality of the first marriage to establish a conviction for bigamy, but to hold that the evidence adduced by the State, in the *absence of specific objection, was competent, and, in the absence of any explanation or contradiction, is sufficient to establish the fact and validity of the first marriage.*

It follows that there is no error in the judgment of the Court below, and it is affirmed.

CRANE *v.* STATE.

(*Knoxville.* November 12, 1894.)

PARDON. *Suspension of sentence for application for pardon.*

The execution of a sentence of imprisonment should not be suspended to enable the defendant to apply for pardon unless the Court believes that the case is a proper one for executive clemency and is willing to be understood by the Executive as recommending it. The Court is unable to find anything in the facts of this case which would, either in law or morals, justify any suspension of the sentence.

Case cited and distinguished: Allen *v.* State, M. & Y., 295.

FROM KNOX.

Appeal from Criminal Court of Knox County. T. A. R. NELSON, J.

J. H. WELCKER, H. H. INGERSOLL, and J. F. J. LEWIS for Crane.

Attorney-general PICKLE for State.

WILKES, J. At a former day of the present term of this Court, the appeal of the defendant, Geo. S. Crane, was heard, and the judgment of the Criminal Court of Knox County was affirmed, resulting in the sentence of defendant, Crane, to imprisonment in the

State penitentiary for three years for bigamy. He is still in the jail of Knox County, not having been delivered to the keeper of the penitentiary to serve his sentence.

A petition is now filed, asking that the execution of his sentence be suspended until he can apply to the Governor of the State for a pardon.

The power of this Court to grant such a suspension in a proper case, is clearly given by § 6096, M. & V. Code, as follows: "In case of the conviction and sentence of a defendant to imprisonment, the presiding Judge may, in all proper cases, postpone the execution of the sentence for such time as may be necessary to make application to the executive for a pardon or commutation of punishment."

This power and discretion was exercised by this Court in the case of *Allen* v. *The State*, Martin & Yerger, 295. It is apparent, however, from a reading of the statute, that such power and discretion to suspend execution of sentence will only be exercised in proper cases, and it will not be extended to cases generally; otherwise, the course of justice would be impeded, and the Governor deluged with applications in all cases before the convicted person could be imprisoned. It therefore devolves upon us to look to the facts of this case as disclosed by the record and the petition and papers accompanying it, and determine whether this is a proper case.

It is pertinent to say, that the petition to suspend is supported by the affidavits and indorsements of

many good people of the city of Knoxville, including the mayor, chief of police, prominent business men, editors, clergymen, physicians, the clerk of this Court, some attorneys, and one lady, in which they substantially state, that during the residence of the defendant in Knoxville, for about eight years, he has been a quiet, orderly, respectable citizen, and, being somewhat of a mechanical genius, has built up a business at once profitable to himself and helpful to the community, in designing and manufacturing surgical appliances; that he has all the time been honest in his dealings, and is a valuable member of society. Recently, before his conviction, he was married to an estimable lady in Knoxville, she being utterly ignorant of his former marriage. The witnesses evince great sympathy for this lady, placed in such an unfortunante condition, and express an earnest desire that, so far as possible, she may be relieved. In all their expressions of sympathy with the lady thus deluded, the Court heartily joins. It is evident, however, that the pardon of defendant, if it should be granted, cannot ameliorate the condition of this good woman, as a further continuance of their former relations would be illegal unless defendant should be divorced from his lawful wife and remarried to her. It is intimated that this can be procured, but on what grounds is not stated, and the Court is utterly unable to comprehend, upon what grounds a divorce can be procured by the defendant. The deserted wife might apply for and obtain such divorce, but why

she should desire to do so we cannot see, unless it be to furnish another instance of a woman willing to sacrifice her own life in order that the man who has betrayed her may be shielded from harm and freed from care.

The facts in the case are that, about eight years ago, defendant was a guest of his uncle, in Alexandria, Va., for about six months. At the same time, Addie Peverill was an inmate of the same house, being a niece of the uncle's wife. During their stay under the same roof, defendant seduced the young girl, then about sixteen years of age. Whether this was accomplished under promise of marriage, the record does not expressly disclose, but we can fairly infer that it was so done, from the fact that, at the earnest request of the girl's aunt, defendant returned to Alexandria from Knoxville, where he had gone, and married the girl, and lived with her for five or six days, when a child was born, the result of their previous illicit intercourse. Defendant immediately thereafter deserted the wife and child, and came to Knoxville, where he established himself in business, and has ever since remained and prospered, and gained the respect of his business associates and the public generally, and, as the record shows, has fared well, if not sumptuously. In the meantime, the wife, covered with the shame of her seduction and degraded by her desertion, returned with her babe to her father's house, and, from that time to the present, has remained

there, living by the fruits of her own labor or as a pensioner on her father's bounty. There is no evidence that, during the whole of this time, defendant has sent her a dollar for herself or her child, or even a kindly word.

The petition says, with the sincerest feeling, that he was doing no moral wrong, and, without advice or appreciation of the crime in law, defendant entered into the marital relation again. The petition further states that, after the disclosure of the fruit of the illicit indulgence of petitioner and Miss Peverill, he consented to go through the marriage ceremony with her as a matter of form, etc. It appears that, after the second marriage, the father of the girl, and the aunt at whose home she was betrayed and deserted, came to Knoxville, and interviewed the defendant. What occurred between them is not fully disclosed. One good lady states that the father said his purpose in coming to Tennessee was not to convict the defendant, and send him to the penitentiary, but rather to get money from him, and that he regretted the prosecution and conviction. Granting this to be so, it but shows that the father considered that the marital relation still existed, and that the deserted wife and child had some claims upon the defendant for support and maintenance. It does not matter what he may have desired as to prosecution and punishment of the defendant, inasmuch as the public is interested that such offenses against the marital relation and against the decency

and good order of society shall not go unpunished. Whether the father obtained any money for the benefit of the wife and child does not appear.

This is the status of the case. If we decide this to be a proper case to suspend sentence, that suspension carries with it an intimation to the executive that, in the opinion of the Court, it is a proper case for the exercise of the executive clemency and the pardoning power.

Being always desirous of tempering justice with mercy, we inquire, Upon what tenable ground can we base such an implied recommendation? Can we place it upon the ground urged in the petition, that defendant is a prominent citizen and successful business man? This Court cannot be a respecter of persons. But, if it could, then, the more prominent the citizen, the more certain and sure should be his punishment when the guilt is clearly fixed, and has no extenuating circumstances, as in this case. Can it be on the idea set out in the petition that the first marriage was gone through with as a mere matter of form, after the fruits of the illicit intercourse were made apparent? This Court cannot, in any way, sanction the idea that a marriage, under any circumstances, is a mere *matter of form, but it is the most sacred of all relations, and not to be lightly regarded.* Be it said to the credit of the defendant, that when the result of his illicit relations were about to be made public, he did marry his victim so as to legitimate his offspring. It was thereafter his legal and moral duty

to remain constant to the woman who had trusted him with all she had—her honor—and this he solemnly promised at the altar to do, and this he should have done, even if his whole future had been a continuing act of penance for the indulgence of his passions and desires. What, then, shall we say of the fact that, immediately upon the birth of the child—his child—he left the mother in her disgrace, and the infant in its helplessness, while he went to other fields and flouished? We cannot base it on this idea. Can it be on the idea of shielding his last victim—good, virtuous, confinding woman as she is proven to be? A pardon could not legitimate their past relations, nor sanction their continuance. It is one of the hardships of crime that innocent women and helpless children do suffer more than the criminal himself. Every term this Court is compelled to tear men away from their wives and little ones, and consign them to imprisonment, or the gallows, leaving homes desolate and hearts broken. It is not a pleasant matter, but a stern duty we dare not and would not shrink from. This case does not present a case so sad as others coming under our observation almost daily.

We have deemed it proper to say this much in explanation of the reasons why we cannot grant the request of the petitioner, and of the good people of Knoxville who have interested themselves in defendant's behalf. While petitioners sympathize with the good woman who lives among them, and who deserves their

sympathy, they must not forget the desolate wife, who sits disgraced, deserted, and abandoned, at her father's home, when she ought to be at defendant's fireside as an honored wife; nor must they forget the child, who has never known the defendant's care or seen his face, and would hardly care to call him father.

We see no ground, in law or morals, upon which we can interfere with the sentence or stay its execution.

WILCOX *v.* STATE.

(*Knoxville.* November 12, 1894.)

1. EVIDENCE. *Of nonexperts as to insanity, how weighed.*

The opinions of nonexpert witnesses as to the insanity of a person is to be received and weighed in the light of the facts and circumstances related by them and upon which their opinions are predicated. (*Post, pp. 111, 112.*)

2. SAME. *Of experts received with caution.*

The opinions of expert witnesses should be received with caution and investigated with care. (*Post, pp. 112, 113.*)

Cases cited and approved: Persons *v.* State, 90 Tenn., 291; 32 Fed. Rep., 198.

3. CHARGE OF COURT. *Requests properly refused, when.*

Requests for additional instructions to the jury are properly refused where the matters have been fully covered by the original charge. (*Post, pp. 113–115.*)

4. INSANITY. *When insane delusion excuses crime.*

A person otherwise rational who commits a homicide through delusion on a subject connected with the homicide, is criminally responsible, providing he is conscious of right and wrong as applied to the act, and has the ability, because of such consciousness, to choose, by an effort of the will, whether he will commit the act or not. (*Post, pp. 114–120.*)

5. SAME. *Greater indulgence extended to those insane by act of God.*

The law regards the defense of insanity with greater favor and indulgence when interposed by those insane by the act of God than when interposed by those insane by their own willful misconduct. (*Post, p. 122.*)

FROM CARTER.

Appeal from Circuit Court of Carter County.

ANDREW J. BROWN, J.

Wilcox *v.* State.

S. J. KIRKPATRICK, R. R. BUTLER, TIPTON & SIMERLY, GEO. E. BOREN, R. A. SMITH, and C. C. COLLINS for Wilcox.

Attorney-general PICKLE for State.

WILKES, J. C. N. Wilcox was indicted for the murder of Charles Jenkins. He was convicted of murder in the second degree, and sentenced to ten years imprisonment in the State penitentiary, and has appealed to this Court.

The defense relied on in this Court is the insanity of the defendant at the time of the homicide, and it is insisted that the act was the result of an insane delusion upon the part of the defendant, rather than a general derangement of his entire mental faculties upon matters generally.

The deceased was an employe or hireling of the defendant, and had been, for some considerable time before the killing, an inmate of his home, and they were on the most friendly terms up to the time of the homicide. The deceased was driving the defendant's wagon, loaded with corn, along the public road, on the day when he was killed. Defendant's version is, that he and the deceased had some words about an accusation which deceased stated the defendant had made to a neighbor, Smith, about the shooting of Smith's cow, and in the quarrel deceased called defendant a liar, and then drew his knife, and said the matter should be settled then and there; that he, defendant, after retreating across the road to escape

deceased, drew his pistol and shot him. Defendant at the time, so far as he made any explanation, stated that he did the killing in self-defense.

The deceased made a statement, admitted as a dying declaration, in which he said, in substance, that the defendant shot him three times in the head; that he accused the deceased of "cuckolding him," which the deceased denied, and asked defendant what he was going to do about it, to which defendant replied he would show him, and thereupon shot him, and again shot him twice after he fell. The deceased further said that they had, up to that time, been friends; that, after defendant shot him, he took deceased's knife out of his (deceased's) pocket, when he begged him not to cut his throat, while he was at the time sitting "astraddle" of him. The deceased further stated that he and defendant had no trouble about a cow, and that the cow was not even mentioned in the altercation that took place at the time of the killing.

From the testimony of several witnesses, it appears that the first shot was fired into the head and face of the deceased, and he fell in the road. The horses he was driving started to run, and the defendant ran after them, and stopped and hitched them, and then came back to where the deceased was lying in the road, and shot him twice while lying in the road. An open knife was found some ten or twelve feet away, but it was not bloody, and had no indication that it had been used in the

struggle, and was not of a dangerous kind. Some parties having arrived on the scene soon after the killing, defendant withdrew some seventy-five or one hundred yards, and partially secreted himself; and, after a time, returned, and called attention of by-standers to the fact that his clothing had been cut in two places. He also called attention to the knife, and asked some of the witnesses if they saw the deceased attempting to cut him. Several witnesses who were first upon the ground, and not far from the scene of the killing, testify that defendant shot the deceased twice after he was down, and while standing over him. They are very emphatic that, at this time, the clothes of defendant had not been cut, and they state that they observed this closely, for the reason that defendant was claiming that he had shot in self-defense, and while the deceased was attempting to cut him. They are very positive and emphatic that the clothing was not cut until after defendant went off about one hundred yards, and afterwards returned, and called attention to the cutting.

It further appears that the killing created intense excitement, and caused quite a collection of citizens, and threats were made of mob violence, and that through it all the defendant appeared cool and unexcited, and strenuously objected to going to jail.

It further appears, from statements made by his counsel, that he would not, at any time after the occurrence, talk about the killing, nor consult about

any line of defense, but was urgent and persistent, at all times, that an immediate trial be had.

It appears also, that the defendant was addicted to the excessive use of morphine and cocaine, taking the drugs in doses sufficient to kill twenty men not addicted to their use, at a single dose; that he had carried on this habit for years, and had grown rapidly more and more addicted to their use, and come more and more under their influence. It is strenuously insisted that, as a result of this excessive use of opiates, together with hereditary tendencies derived from his ancestors, and kinspeople in both the direct and collateral lines, the defendant had become insane, and that his mind was filled with the delusions of a disordered brain to such an extent as to overpower his will and render him without responsibility—at least for acts done under the influence and in the direction of these delusions.

Many witnesses are examined, both experts and nonexperts, in regard to the mental condition of the defendant. It appears that he was, at one time, a man of good mental capacity, described by many of the witnesses as an exceptionally bright man; that he was an active business man; had studied and practiced medicine with success, and was regarded universally as a man competent to attend to his business affairs. He is also shown to have been an arbitrary, dictatorial man, of strong will power, and, from his boyhood, of quick, active, irritable temper, and it is insisted that many of his arbitrary and

dictatorial acts were the result, and are evidences, of his mental unsoundness and the strong hold which the drugs had obtained over his actions. Nineteen witnesses testify that the defendant had been of unsound mind for several years. Some of them are physicians, and among them Dr. Callender, superintendent of the insane asylum at Nashville, who gives his opinion upon a hypothetical case, and Dr. Campbell, superintendent of the insane asylum at Knoxville, who gives his from a personal examination. The nonexperts are gentlemen who have known the defendant for years in a business and social way, and who give facts and incidents in his life from which they form their opinions.

It is objected that the Court erred in saying to the jury, in substance, that the opinions of these nonexperts were only to be received and weighed in the light of the facts and circumstances related by them, and upon which their opinions were predicated, and that the jury must judge of the reasonableness of the opinions and conclusions from these facts and circumstances, and give them such weight as they deem proper.

The objection is, that the jury should not weigh their opinions alone from the facts upon which they are predicated, but that they should give weight to the opinions, not only from the facts and incidents detailed, but also from other facts which the witnesses might know, but which they did not state; and that it would be impracticable for any non-

expert witness to properly place before the jury the details which caused him to form his opinion, such as the appearance and demeanor of the party, his expressions of face, and the appearance of his eye, and the many peculiarities which caused him to form the conclusion he entertained.

We think there is no error in this instruction. A nonexpert witness does not testify from the same standpoint as the expert, and it is for this very reason that he is required to give the facts upon which he bases his conclusions, so that the jury may say whether his conclusions are warranted by the facts, and the opinions of the nonexpert are only valuable and competent to the extent that they are supported by the facts and circumstances upon which they are predicated. Rice on Evidence, Vol. I., page 350; Greenleaf on Evidence, Vol. I., page 581, note.

It is again insisted the Court erred in telling the jury to give the testimony of both nonexpert and expert witnesses a careful and painstaking investigation, with a view to find out the truth, and to keep from being misled or confused by it, for, says the trial Judge, "while expert testimony is sometimes the only means of, or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls, and uncertainties, and requires patient and intelligent investigation to reach the truth." This is only the closing extract from a long and lucid charge as to the weight to be given

to such testimony, both that of nonexpert and that of expert, and the whole is substantially in conformity to the rule laid down that expert testimony is to be received with caution. *Persons* v. *The State*, 6 Pickle, 291; *United States* v. *Pendergrast*, 32 Fed. Rep., 198; Rice on Evidence, Vol. II., page 708.

It is insisted that the Court erred in refusing to give to the jury, in his charge, certain requests set out in the bill of exceptions.

The record states that the trial Judge declined to give the charges as requested, further than he had already given them in his general charge. It has been repeatedly held by this Court, that the trial Judge cannot be put in error if he decline to adopt the language of counsel in their requests, and to give a charge in the exact words or terms suggested by counsel.

If the Judge has fully and correctly stated the law on a given proposition, he can, and should, decline to recharge it by adopting a mere change in phraseology suggested by counsel. Otherwise the trial Judge must repeat and reiterate his charge in as many different forms as counsel may see proper to suggest, and thus unduly impress the jury or create confusion in their minds.

The first instruction asked is as to reasonable doubt in the minds of the jury. This question was charged upon by the trial Judge fully and repeatedly in his main charge, and in each and every possible

aspect of the case, and we do not think the trial Judge was in error in refusing to repeat it again, in the words selected by counsel.

The second request we do not consider good law, in the shape in which it is presented. The idea that an irresistible impulse "is an excuse for the commission of crime, where the party is capable of knowing right from wrong, has no foundation in our jurisprudence." 3 Rice on Evidence, pages 642–655.

The third request is one which touches the real and prominent point of defense in this cause. The gist of this request is that the Court did not define what is called an "insane delusion," and a definition is embodied in the request, and asked to be given in charge, as follows: "An insane delusion of the mind is an unreasoning and incorrigible belief in the existence of facts which are untrue; a condition of mind into which a person has not reasoned himself, and out of which he cannot reason himself. And, if the jury find from the testimony in the case that the defendant was suffering from such an insane delusion at the time he shot the deceased, and that the shooting was the product of such insane delusion, and, if the defendant, when he shot deceased, was acting under such insane delusion, and such an impulse that he had no will power to control his acts, then, under such state of facts, it would be the duty of the jury to acquit the defendant."

It is urged with much zeal that such a definition

was necessary in this case, inasmuch as the theory of the defense was that defendant, when he did the killing, was suffering from an insane delusion that the deceased had been on too intimate terms with defendant's wife. It is proper to remark, in passing, if such a delusion existed, it is apparent that there was no cause or basis for it whatever, for defendant's wife is shown to be of the purest and most irreproachable character, and the delusion to be wholly without foundation, if it existed.

It is true that the Circuit Judge nowhere attempts to give to the jury a technical definition, as an abstract proposition, of what it takes to constitute an insane delusion, nor do we think it necessary that he should have done so, and an effort to do so would probably have confused, instead of aided, the jury in its deliberation.

The trial Judge's charge was full upon the question of insanity, and especially that phase or feature of it referred to as a delusion. The Judge says: "A person may be wholly or partially insane. He may have insane or false illusions, that is, be led by some false notion or hobby, and these illusions may be of such character, and have such power over and control of the mind and will of the person, as to deprive him of all power, and by an irresistible force compel him to commit a very heinous and revolting crime, thus rendering the party wholly irresponsible for the crimes he commits, impelled and controlled by the false and insane illusions."

And again: "Insanity, in order to excuse a party for crime, must be of such a character as to deprive the person of his reason, in so far as to render him incapable of distinguishing between right and wrong, or of discerning good from evil; or the insane or false illusions must be of such a character as to deprive him of his will power, and have such control over him as to force him to do the act without the power to control his mind and will, and render him unable to resist the impulses to do the act."

And again: "If you should be satisfied that defendant did the shooting under, or by the influence of, such false and insane illusions as found him without power to resist them, or if you have a reasonable doubt of the matter, you must acquit him."

And again: "The subsequent conduct of the defendant can be looked to to ascertain whether or not defendant was insane, or acting under, or moved by insane illusions at the time of the shooting, but for no other purpose."

It is apparent from these extracts from the charge, that the trial Judge instructed the jury fully, and in a practical way, as to the meaning of insanity, and the weight to which it was entitled as a defense, and that he made prominent the feature of insane delusions or illusions, upon which counsel bases his right to relief. We think the charge did ample justice to the defendant upon his counsel's theory of the case, and is unusually full and clear upon the whole question, and is more practical than any at-

tempted technical definition could have made it. We see no error in the charge of the Court.

It is strongly pressed upon the Court that the evidence presents a case of insane delusion, and, therefore, the verdict should not be upheld. It has been pertinently said that in criminal cases the correct issue is not that of sanity, but of responsibility. 1 Wharton & Still, Med. Juris., Sec. 112. The delusions of a sane man do not make him irresponsible. Same, Sec. 142. The question is, in such cases, Is the delusion set up as a defense the delusion of an insane person? Same, Sec. 137; 3 Rice on Evidence, p. 671.

Many men of strong minds have delusions. Remarkable instances are given, in the works on medical jurisprudence, of delusions in men of prominence in all the walks of life. Lord Kenyon had an unreasoning fear of poverty, and so did Lord Stowell, although he was a man of immense fortune. His home was ab-absolutely destitute of the necessities and comforts of life. Lord Erskine would never sit at a table, or re-remain in company, as one of thirteen persons. Lord Eldon, after he had made up his mind and expressed his opinion lucidly and conclusively, was at all times a prey to grave doubts of his correctness. Lord Brougham, upon more than one occasion, was placed in seclusion, his mind being clearly off balance. Judge Brackenridge, of Pennsylvania, is reported to have, on a hot day, while holding Court at Sunberry, gradually taken off his clothes, until he sat

naked on the bench. Judge Baldwin, of the United States Supreme Court, was a hypochondriac. A distinguished New England Judge imagined that a dropsical affection under which he labored was a sort of pregnancy, and yet none of these men were insane, because they had reason and sanity enough to conquer and overcome these delusions. See, on this subject, Wharton & Still, Med. Jur., Secs. 34–52, and 723–743, where other cases are mentioned. A familiar illustration is that of the Mormon elders, who claim that they have a direct revelation from heaven permitting them to practice and teach polygamy. The world generally regards this a rank heresy, and the claim to be the evidence of an unreasonable delusion. It has, however, been held that they cannot defend on the ground of such delusion, inasmuch as otherwise they are sane, shrewd, active, successful, and unusually practical men in their business and social relations, and they have been held responsible for such delusions. Wharton on Criminal Law, Secs. 84, 850, 1682; *United States* v. *Reynolds*, 98 U. S., 145.

"An uncontrollable impulse of the mind, co-existing with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity, but the question is always whether the accused, at the time he committed the act, knew its nature and character, and that it was wrong." Wharton & Still, Med. Juris., Sec. 152, Note 1.

The rule is tersely stated in Archbold, Crim. Pr.

and Pleading, as follows: "The insanity must be of such a kind as entirely to deprive the person of reason, as applied to the act in question, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong in his own case, and to know that he was doing wrong in the act which he was committing, he is liable to the full punishment of his criminal acts."

The capacity to know right from wrong and to know that the particular act being committed is wrong, is recognized as a correct rule in Tennessee, to test the question of criminal responsibility. But few, if any, of the witnesses examined in this case as to the mental condition of the accused, were examined with reference to this test, but rather as to his general mental condition, based on various and different facts and circumstances. The accused is shown to have been of a proud, self-willed, arbitrary, irritable disposition, and these traits were perhaps heightened to an unusual degree by the excessive use of opiates. Still he is shown to have been able to attend to his business actively, up to the time of the homicide, and was regarded as a shrewd, intelligent, though eccentric man. Counsel have not, in view of the facts developed in the record as to his general mental condition, attempted to rest their defense upon his general mental derangement, though that feature is the one made prominent by the testimony, but they have relied on the idea that

defendant was acting under an illusion, or delusion, that the deceased was guilty of improper relations with his wife.

In the case of *The State* v. *Windser*, 5 Har., 512, the defense was delusion consisting of a belief that the prisoner's wife was untrue to him; that his children were illegitimate; that sundry conjurations were practiced on him, but the evidence showed that otherwise he was a shrewd, sensible, and wealthy business man. The Court charged the jury that if a person otherwise rational commit a homicide, through delusion on a subject connected with the homicide, he would be criminally responsible, provided he was conscious of right and wrong as applied to the act, and had the ability, because of such consciousness, to choose, by an effort of the will, whether he would commit the act or not, and this holding has been repeatedly approved.

The conduct of the defendant, in this homicide, clearly indicates that he knew he was doing a wrong and unlawful act when he did it. The killing was not the frenzied impulse of the moment when he imagined the act of infidelity occurred, but after he had talked about it to his father, and had reflected upon it, and reasoned himself out of it, until he was cured of the delusion, and then again allowed it to re-enter his mind, not as a momentary, irresistible impulse, but as a jealous suspicion, which led him to talk to the deceased for quite a time before he killed him. It cannot be that the jealous suspicions which so

many men entertain without any foundation, can be magnified into insane delusions which would exempt them from punishment for crimes originating in such jealousy. His own statement that he shot the deceased in an altercation about a cow, and for the purpose of self-defense, negatives the idea that he shot under the delusion of his wife's infidelity, so far as his statements are to be considered. His plea of self-defense, and his ingenuity and deliberation in sustaining that defense by cutting his own clothing, and by taking the knife of the deceased from his person and opening it and exposing it where it could be seen, and calling attention to it, and to his cut clothing, all indicate that he was conscious of having done wrong, and the necessity for making a plea of self-defense to avoid the consequences of an unlawful act. It was more the reason and caution of an intelligent man than the cunning of one insane.

That there was an altercation between the two men which lasted for sometime before the shooting, is evident from the testimony, and that it finally resulted in the shooting of the deceased, not as a matter of self-defense, but either to avenge a fancied wrong or as a result of jealousy, or as an act of overbearing imperiousness, is apparent. The whole matter was submitted to the jury under a proper charge. They were evidently not of the opinion that the defendant's mind was unbalanced, or that he was under such a delusion as would free him from criminality in the act. In a sense, all unfounded suspicions are

delusions, but they do not, for that reason, excuse crime.

The insanity set up as a defense in this case is not hereditary or natural, but voluntary, in the sense of having originated from the use of drugs. While this is an unfortunate and unhappy condition, the law does not, and cannot, regard it with the same leniency that it does cases of adventitious insanity, not caused by the act of the party himself. Parties who persist in subjecting themselves to the persistent use and habit of taking alcoholic drink, or other poisionous compounds and drugs, cannot expect the same forbearance and immunity from punishment as those bereft of reason by the act of God.

It is admissible and proper to show the immoderate use of drugs or whisky, not to excuse crime, but to illustrate the mental condition with a view to fixing the degree of the crime as it depends upon deliberation and cool, malicious purpose.

The jury have in this case evidently given the defendant the benefit of all that he was entitled to, on account of his condition of mind, in reducing this offense to murder in the second, instead of murder in the first degree, which, under other circumstances, could have been well supported by the facts attending this cruel and unprovoked killing, remarkable for its atrocity and want of provocation.

We see no ground of reversible error, and the judgment must be affirmed.

*SHIELDS *v.* CLIFTON HILL LAND CO.

94 123
110 665

(*Knoxville.* November 20, 1894.)

1. CORPORATIONS. *Pleadings and proof insufficient to raise syndicate liability.*

Allegations that a corporate charter was invalid because defectively acknowledged, and that the promoters are therefore personally liable, are not sufficient to charge them with personal liability on any other ground, such as that of a partnership liability antecedent to the attempted incorporation. The Court likewise decides, upon elaborate consideration, that the evidence fails to show any antecedent partnership liability of the promoters. (*Post, pp. 125–144.*)

Cases cited and distinguished: Broyles *v.* McCoy, 5 Sneed, 603; Brandon *v.* Mason, 1 Lea, 615.

2. SAME. *Purchase of lands by corporation, not by syndicate, when.*

A purchase of lands in the name of a corporation the charter of which, prepared for that purpose by the vendor's attorney, had been signed and filed, but defectively acknowledged, and for which money notes were given, signed by a person described as its president, although no organization by election of officers had then been made, does not make him or other promoters personally liable on the purchase, especially when the corporation, at its first formal meeting, approved the purchase, and the vendors have recognized it as the purchaser on a foreclosure. (*Post, pp. 137–144.*)

3. SAME. *Charter acknowledged before Notary void.*

A charter acknowledged before a Notary Public was void under the general incorporation statute of 1875. (*Post, pp. 146, 147.*)

Act construed: Acts 1875, Ch. 142.

Cases cited and approved: Brewer *v.* State, 7 Lea, 682; Teasley *v.* State (oral).

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*Reported and annotated in 26 L. R. A., p. 509.

4. SAME. *Statute curing void charter constitutional.*

A statute curing a defective acknowledgment that rendered a corporate charter void, and thereby defeating an existing liability of the corporators under the contract of the company, does not impair any contract obligation of the other parties to the contract. (*Post, pp. 146–153.*)

Constitution construed: Art. I., § 20.

Act construed: Acts 1890, Ch. 17 (Ex. Ses.).

Cases cited and approved: Townsend *v.* Townsend, Peck, 15; Wynne *v.* Wynne, 2 Swan, 405; Collins *v.* Railroad, 9 Heis., 847; Marr *v.* Bank, 4 Lea, 585; Knoxville *v.* Bird, 12 Lea, 121; Demoville *v.* Davidson County, 87 Tenn., 223; 94 U. S., 113; 97 U. S., 25; 101 U. S., 814; 108 U. S., 150–1, 488; 2 Peters, 412.

5. SAME. *Same.*

A law which facilitates the intention of the parties to a contract by removing its invalidity does not impair any vested right. (*Post, p. 152.*)

Case cited: 2 Peters, 412.

6. SAME. *Estoppel to deny validity of charter.*

Persons who have sold land to a defectively organized corporation, and taken back purchase money notes, will be estopped from denying the corporate liability and seeking a recovery from the corporators of the amount due, if for more than five years, and until after the company's charter and contracts have been expressly validated by the Legislature, they have recognized the notes as corporate obligations, and attempted to enforce them by legal process against the corporation. (*Post, pp. 153, 154.*)

Case cited and distinguished: Broyles *v.* McCoy, 5 Sneed, 603.

7. SAME. *All creditors can enforce payment of stock subscriptions.*

A creditor whose debt was created before the capitalization of the company or any subscriptions to its stock, as well as subsequent creditors, can, under the Tennessee statute, enforce the liability of the stockholders for unpaid subscriptions. (*Post, pp. 154–159.*)

Code construed: § 1708 (M. & V.).

Act construed: Acts 1875, Ch. 142.

Case cited and approved: 120 Ill., 350.

8. SAME. *Contract to receive property in payment of stock subscriptions.*

An authorized contract, whereby a corporation receives needed property in payment of stock subscriptions, is presumed valid until it is impeached by appropriate pleadings and proof. (*Post, pp. 159–162.*)

Cases cited and approved: Kelley Bros. *v.* Fletcher, *ante*, p. 1; 5 Dillon, 50; 31 N. E. Rep., 362; 119 U. S., 345.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. MCCONNELL, Ch.

J. T. & J. K. SHIELDS, WHITE & MARTIN, and PICKLE & TURNER for Complainants.

ANDREWS & BARTON; WATKINS & BOGLE; COOK, FRAZIER & SWANEY; BARR & MCADOO, and NEIL W. CARUTHERS for Defendants.

CALDWELL, J. This is a suit by vendors of real estate to collect balance of purchase money remaining unpaid after enforcement of vendors' lien, by resale of the land and application of proceeds.

On February 3, 1887, Mrs. Anna N. Watkins, a widow lady, and her daughter, Miss Alice M. Watkins, in consideration of one thousand dollars ($1,000) to them paid, executed to Chas. A. Lyerly, president of the East End Land Company, an option on their farm of 190 acres of land, near Chattanooga,

Tennessee. By the terms of the option, the ladies bound themselves to execute to said Lyerly, "or his indorsee" of the option, a warranty deed to said land, if said Lyerly "or his indorsee" should, within twenty-five days thereafter, pay to them, thirty-five thousand dollars ($35,000) in cash, and, further, execute to them five several promissory notes for eighteen thousand dollars ($18,000) each, due respectively at one, two, three, four, and five years, "with interest from date at six per cent., payable semi-annually, and secured by a vendors' lien on the land."

On February 28 (the day the option expired), the directors of the East End Land Company, in regular meeting, decided that their company would not purchase the land, and, upon motion regularly made and carried, directed that the option "be transferred to another company, or purchasers," preferring the stockholders of the East End Land Company.

On the same day, Chas. A. Lyerly paid to J. A. Caldwell, agent and attorney for the vendors, eight thousand five hundred dollars ($8,500), as a part of the cash payment for the land. A few days later, on March 7, 1887, he made a still larger payment to the same person, and ten days thereafter, he paid the balance, taking a receipt in the words and figures following:

"$10,350.00. Received of Chas. A. Lyerly, ten thousand three hundred and fifty dollars ($10,350), balance cash payment on his purchase of our Oakland farm in Ninth and Seventeenth Districts, upon the

terms and conditions mentioned in our contract, dated fifth (5) February, 1887. Deed to be made as therein stipulated, upon the request of said Lyerly or his assignee. This the seventeenth of March, 1887.

(Signed) "MRS. A. N. WATKINS,
"ALICE M. WATKINS,
"By J. A. CALDWELL, *Agent.*"

On the day this last payment was made, the persons who had decided to organize "another company" to purchase the land, and who had furnished Lyerly the money with which to make the cash payment of thirty-five thousand dollars ($35,000), procured the same Mr. Caldwell to draft a charter for such other company, the latter to be known as the Clifton Hill Land Company. The charter was drawn as desired, and signed by six incorporators on that day. It was acknowledged on March 22, 1887, recorded March 24, 1887, filed for registration with the Secretary of State March 28, 1887, and thereafter finally registered in the Register's office of Hamilton County, where the corporation was to have its chief business office, on March 30, 1887.

Chas. A. Lyerly, the owner of the option, assigned or transferred it to the Clifton Hill Land Company, and on the fourteenth day of April, 1887, the vendors, in pursuance of the terms of the option, executed a deed, whereby they conveyed the land to the said company, as his "indorsee" or "assignee." The notes were made to run from the first day of March, 1887, though dated April 14, 1887. Ex-

cept as to date of maturity, the notes were the same. The one maturing first is in the following words:

"CHATTANOOGA, TENN., April 14, 1887.

"On first March, 1888, next after date, we promise to pay to Mrs. Anna N. Watkins and Miss Alice M. Watkins, or order, eighteen thousand dollars, value received, with interest at 6 per cent. per annum from March 1, 1887, payable semi-annually.

"This note is given for part consideration for and its payment is secured by a vendors' lien on the following real estate * * described in deed of this date. If necessary to resort to law, to enforce the payment of this note or protect the security for its payment, we agree to pay all costs of necessary litigation, together with a reasonable attorney's fee.

"$18,000.00. (Signed) E. WATKINS,

"*President Clifton Hill Land Company.*"

Mr. E. Watkins, whose name appears upon the notes, was one of the incorporators, and it was understood between him and his associates that he should be the president of the company, though no organization was in fact effected, by the election of officers, until the ninth of June, 1887, at which time he was elected president.

E. Scott was elected secretary and treasurer of the Clifton Hill Land Company at the same time; and thereafter, in September and November, he, as such officer, paid to the vendors twenty-seven hundred dollars ($2,700), the first semi-annual inter-

est on said five purchase money notes. These payments were made to J. A. Caldwell, and receipted for by him as agent and attorney.

On April 9, 1889, the principal of two of the purchase money notes being then due and unpaid, the vendors filed their bill against the Clifton Hill Land Company and E. Watkins, to enforce their vendors' lien; E. Watkins being made a party for the reason simply that his name appeared upon the notes. He demurred to the bill, because it contained no allegation whereon he could be charged with personal liability. His demurrer was sustained, and the bill was dismissed as to him.

Thereafter, on the nineteenth of March, 1890, the vendors and W. S. Shields, who had intermarried with Miss Alice M. Watkins, filed a supplemental bill, whereby they sought to hold the incorporators of the Clifton Hill Land Company personally liable for the balance of purchase money that might remain unpaid after exhaustion of the land, upon the alleged ground that the charter obtained by them was invalid, and that their attempted incorporation thereunder was, as a consequence, ineffectual.

Pending these bills, the Clifton Hill Land Company filed a bill against the vendors and others, seeking to rescind the sale of the land to that company, on account of alleged fraud and deceit practiced in the sale of the land. This bill was answered, and all charges of fraud and deceit were denied. Of this last bill it need only be further

said, at this place, that it was dismissed upon final hearing; and from the decree of dismissal there has been no appeal or writ of error.

In the progress of the litigation, the vendors voluntarily dismissed their supplemental bill, so far as it sought "any personal relief or recovery against the individual defendants, but no further or otherwise." And upon the hearing of the case as it then stood, decree was rendered against the Clifton Hill Land Company for the balance of unpaid purchase money, attorney's fees, etc., and the Master was directed to sell the land in satisfaction thereof, unless the amount due should be paid into Court within a time named. The money was not paid, and the land was sold, and purchased by the original vendors, at the price of forty-seven thousand dollars ($47,000). The sale was confirmed, and title divested and vested.

From these decrees the Clifton Hill Land Company appealed to this Court.

The case was considered, and the decree below affirmed, upon grounds appearing in the opinion of this Court reported in 91 Tennessee, at pages 683 to 692, inclusive.

On March 1, 1892, while the appeal in that cause was still pending, W. S. Shields and his wife, formerly Miss Alice M. Watkins, and her mother, Mrs. Watkins, commenced the present proceeding by what the pleader termed "an original bill in the nature of a supplemental bill," to establish per-

sonal liability upon E. Watkins and various other defendants, and to collect from them individually the balance alleged still to be due on the decree rendered against the Clifton Hill Land Company under the vendor's bill.

In an amended and supplemental bill, filed by the same parties on February 3, 1893, they allege that the said balance, as ascertained by decree of this Court in the other case, is $77,916.50; and that an execution has been issued for the same and returned *nulla bona*. The grounds upon which individual liability is claimed on the one hand in these bills, and denied on the other hand in the answers thereto, will properly appear hereafter. At this point it is sufficient to say that each and every defendant, except the Clifton Hill Land Company, strongly denied his liability upon any ground, and that the Chancellor, with the pleadings, proof, and decrees in all the cases herein mentioned before him, deemed the defenses good, and therefore dismissed these bills. Complainants have appealed and assigned errors.

The first assignment of error is as follows: "The Court erred in refusing to hold the said individual defendants who composed the syndicate, or partnership, liable for the balance due complainants on the purchase price of said lands. The notes given therefor were those of the partnership, and not the notes of the corporation. They antedate the corporation."

This assignment, and the argument in support of

it, are based upon the contention that the incorporators of the Clifton Hill Land Company, and their associates, were, in the first instance, partners under that name, and that as such they purchased the land and gave notes for the purchase money before incorporation, and in doing so became individually liable for the purchase price. If this contention be true as to the facts of the case, it is also true as to the legal result, nothing else appearing.

"It is well settled," says Judge Wright, "that where an association, which has existed as a mere copartnership, becomes incorporated, and the corporation then accepts an assignment of all the property of such association, for the purpose of carrying out their object, they are primarily and jointly and severally liable for all the debts incurred before the act of incorporation. In such a case the responsibility of the corporation for contracts previously made with the association does not become substituted so as to exempt the members from individual liability, and it does not change the case that the members of the company had it in view to procure a future act of incorporation when it was formed." *Broyles* v. *McCoy*, 5 Sneed, 603.

But these complainants can have no relief upon that view of the case, because neither alleged in the pleadings nor established by the proof.

It is true that "when the language of a bill is susceptible of a limited or enlarged construction as to its object and extent of relief sought, but the sub-

sequent proceedings show that the complainant, the Court, and the defendant, construed the words in the enlarged sense, that meaning will be considered as the one intended." *Brandon* v. *Mason*, 1 Lea, 615.

That rule, however, will not save the present case on the point made in the first assignment of error. The bills proceed upon two, and only two, distinct and alternate grounds of personal liability: (1) because the attempt to incorporate was ineffectual, and (2) because, if effectual, subscriptions to stock have not been fully paid. The proposition of liability upon any other ground is not advanced in either of the bills. Those parts of the very lengthy original bill most directly in point are the following: "Complainants are informed, and upon such information charge, that the defendant, Clifton Hill Land Company, was intended to be chartered and organized as a corporation under the Act of 1875 and amendatory Acts of the Tennessee Legislature. A charter was attempted to be obtained on March 30, 1887, and is in substantial compliance with said Act, except that the signatures of the persons applying for the charter to the same, were acknowledged before W. G. McAdoo, Jr., a Notary Public, instead of the County Court Clerk, as then required by law.

"Whether said defendant is a corporate body, under which its promoters can escape personal liability, or a partnership, these complainants submit to the wisdom and decision of the learned Court, and, in view of the uncertainty attending a solution of this ques-

tion, ask to be allowed to file its bill in a double aspect, as more fully set forth hereafter.

"The charter members of said defendant company are defendants E. Watkins, E. Scott, I. Noa, Jas. S. Pinkard, S. W. Divine, and Jno. A. Hart, now deceased.

"Acting upon the supposition that they had a valid charter, the promoters and projectors of the Clifton Hill Land Company fixed its capital stock at $250,000, divided into 2,500 shares of the par value of $100 each, and opened books for stock subscription. The stock was all subscribed, officers elected, and all steps taken necessary to fully organize and equip a corporate body for business. The officers elected were as follows: Defendant E. Watkins, president; I. Noa, vice president, and E. Scott, secretary and treasurer. The $250,000 of stock was subscribed for by the following persons, as shown by the minute book kept by the secretary and treasurer, Scott:

NAME.	NO. SHARES.	AMOUNT.
Jno. A. Hart	250	$25,000
W. P. Richardson	500	50,000
E. Watkins	250	25,000
T. C. Catchings	250	25,000
I. Noa	250	25,000
E. Scott	250	25,000
H. A. Bussick	250	25,000
Little & Brown	250	25,000
Jas. S. Pinkard	250	25,000
Making in all		$250,000

Again: "Complainants are advised and insist that

the defendant, Clifton Hill Land Company, at the time it became indebted to complainants, was not a valid and legal corporation, by reason of having its charter defectively acknowledged, the acknowledgment having been taken before a Notary Public, instead of the County Court Clerk, as the law at that time required; and that said Clifton Hill Land Company was a voluntary association, and that all those who were interested in the same and agreed to take stock therein are liable to complainants individually and personally, each for the entire amount of the notes heretofore sued upon, as hereinbefore stated.

"Complainants are further advised and insist that complainants' rights having been acquired and vested when said notes were executed, in the year 1887, that the subsequent Act of the Legislature, attempting to legalize corporations whose charters were acknowledged before Notaries Public, could not affect rights then vested, and, regardless of the effect of said Act upon the rights acquired subsequent to its passage, said Act could in no way affect or disturb complainants' vested rights to hold said projectors of said corporation as partners personally liable upon such notes; and complainants ask that said defendant stock subscribers hereinbefore named be held personally liable for the balance due upon the decree hereinbefore left unpaid after crediting the net amount received from the sale of the 190 acres of land. But if complainants are mistaken in this position, and said defendant company is a valid cor-

poration, and must be treated as such in these proceedings, then complainants insist that said defendant stockholders hereinbefore mentioned are liable to them upon their various and sundry stock subscriptions. * * * Said company, as its name indicates, was a land company, organized for the purpose of speculating in real estate, having for its object the buying of large bodies of land and subdividing the same, and selling it off into lots and blocks at an advanced price."

These allegations, briefly stated, are that the charter of the Clifton Hill Land Company was invalid because defectively acknowledged, and that the defendants are therefore personally liable for the company's debts; and, in the alternative, that if it should be adjudged valid, then defendants are personally liable for unpaid stock. Whether they were liable upon the one ground or the other, complainants, filing their bill "in a double aspect," are pleased to "submit to the wisdom and decision of the learned Court." That the complainants themselves so understood their original bill is further shown by the face of the amended and supplemental bill. In the latter bill, among other things, they say: "Said original bill further charged that the defendant company had attempted to procure a charter of incorporation under the laws of Tennessee, pursuant to the provisions of the Act of 1875 and amendatory Acts, but that the acknowledgment of the charter was had before a Notary Public, and

not the Clerk of the County Court, as the law required; and the question of the legality of said charter was submitted to the Court, the bill being brought in two aspects: (1) To hold the projectors of the said Clifton Hill Land Company personally liable in the event it was ascertained that the attempted corporation was illegal; and (2) to hold them liable as stockholders for non-paid-up stock in the event the Clifton Hill Land Company was ascertained to be a body corporate."

The theory of partnership or syndicate liability, otherwise than as the legal result of a futile effort at incorporation, is not put forth in either of the bills. The answers did not enlarge the scope of the bills themselves. Their denials of personal liability, though in the broadest language, are to be applied only to the grounds upon which such liability was charged in the bills.

If it were conceded, however, that the bills state facts sufficient to charge defendants with personal liability as partners in the purchase of the land, prior to a grant of the charter, and without reference to its validity or invalidity, the result would still be the same, upon this branch of the case; for the reason that the proof introduced fails to show that the land was so purchased.

Undoubtedly, some of the defendants, who were stockholders in the East End Land Company, contemplated the purchase of this land, in some form, from the time that company declined to buy it. The

idea among them was to find ten men who were willing to become equally interested in the matter. Nine were found, and one of them agreed to take a double part. They accordingly furnished to Chas. A. Lyerly, in three installments, $35,000, with which he made the cash payment. At first there was no distinct agreement or understanding, even among those parties themselves, and, much less, with Mrs. Watkins and her daughter, as to the form in which the purchase should be made, or who should become the owner of the land, receive the deed, and make purchase money notes. It was soon determined, however, that a corporation, to be organized and known as the Clifton Hill Land Company, should be the purchaser; and on the day the last instalment of the $35,000 was paid to the agent and attorney of the vendors, he was apprised of that fact, and employed to prepare the charter, which he did without delay. The charter was signed, acknowledged, filed with the Secretary of State, and then finally registered, with his certificate attached. Assuming all of those steps to have been regular, as they were unquestionably intended and supposed by all parties to be, the formation of the company as a body politic was then complete; and its validity as such could not thereafter be collaterally questioned. Code (M. & V.), 1693.

Soon thereafter the Clifton Hill Land Company, as the assignee of Lyerly, completed the purchase of the land, by taking a deed thereto, and executing notes for the unpaid purchase money. The vend-

ors never thought of the nine promoters, if they be termed such, as their vendees. They were not concerned as to who the purchaser should be. All they wanted was to have the terms of the option complied with, for their own security; and whether that should be done by Lyerly or by another as his assignee of the option, was a matter of indifference to them. They, in fact, supposed, as they repeatedly say in their depositions, that the East End Land Company was their vendee. This supposition on their part was no doubt due to the fact that Lyerly, the holder of the option, was president of that company. Certain it is that they did not think they were selling to a mere partnership or syndicate, and that they did not rely upon the personal liability of these defendants as original purchasers. Mr. Caldwell, their agent and attorney, who represented them intelligently, faithfully, and honestly, from first to last, in this whole matter, and who was conversant with all the important stages of the transaction, had no thought that these defendants were purchasing the land and assuming to pay for it, either as a copartnership or as individuals. He knew that the Clifton Hill Land Company, but recently incorporated, was in fact the real purchaser and vendee. He wrote the charter with that fact in view, and subsequently drafted the deed and purchase money notes. The name "Clifton Hill Land Company" was used for the first time in the charter; and there was no prior copartnership or syn-

dicate by that name. The vendors, by the terms of the option, as has already been seen, bound themselves to convey the land to Lyerly "or his indorsee," whoever or whatever that might be. Prior to the final registration of the charter of the Clifton Hill Land Company, all business with respect to the option and the land was transacted with Lyerly, as the owner of the option and purchaser of the land. He made the cash payment and took receipts for the different installments thereof, in his own name. In the last of these receipts the vendors referred to the sale as "his purchase" and again stated that they would make a deed to him "or his assignee."

After the grant of its charter, the vendors dealt with the Clifton Hill Land Company as Lyerly's assignee. They conveyed the land to it, and received its notes for unpaid purchase money. Only Lyerly, the person to whom the option had been granted, and the Clifton Hill Land Company (his assignee) were known in any of the writings with respect to the land or the purchase price thereof. Before the time came to make the deed, Lyerly was on one side of the contract and the vendors on the other. After that time, the Clifton Hill Land Company, Lyerly's assignee, was on one side of the contract and the vendors on the other. In view of the terms of the option, only Lyerly "or his indorsee" could properly have been thought of as vendee. Only he "or his indorsee" could lawfully

have demanded and received a deed to the land. There was no room for any intermediate purchaser. Lyerly assigned the option to the Clifton Hill Land Company as a corporation, not as a syndicate or copartnership, and the vendors conveyed their land to it and took its notes for unpaid purchase money in the same way. Though the assignment by Lyerly and the signature to the purchase money notes fail to characterize the Clifton Hill Land Company as a corporation in so many words, and though the deed to the land has been lost, so that its exact language cannot be known, it is conclusively shown by other proof that the name was used in those instruments as that of a corporation, and not otherwise. There was no voluntary company or copartnership or association by that name. Besides the other proof on the subject, the signature, "E. Watkins, President Clifton Hill Land Company," of itself indicates a corporate contract, and suggests corporate rather than personal liability. *Case Mfg. Co.* v. *Sorman*, 138 U. S., 437.

Mr. Cook, citing that case, says: "The corporation alone is liable where its note was given in fulfillment of a contract entered into in its name, although such contract was prior to its incorporation." Cook on S. & S., Sec. 707, p. 1046.

At the first formal meeting of the stockholders of the Clifton Hill Land Company, on June 9, 1887, after the election of officers and capitalization on the same day, the following action was taken: "On

motion of John A. Hart, it was resolved that this company buy from the original purchasers of the Watkins farm all their interest therein, and pay them, in paid-up stock of this company, the sum of $250,000, and assume their liability of $90,000 due to Mrs. Watkins, the original vendor."

This minute entry is said to afford "unequivocal evidence" that the notes given to the vendors of the land were the notes of a "syndicate." Such would seem to be true if that were all the evidence on the point, but, in the light of the other evidence in this record, it cannot be so. The object of the motion, judged by the other writings and proof, to which reference has already been made, must have been simply to formally approve the purchase already made for the corporation, and to provide for the issuance of stock to those who had furnished money with which to make the cash payment. The language used is not the most appropriate for the accomplishment of such an end; still, that must have been the purpose.

Treating the organization as not entirely complete when the deed was made to the Clifton Hill Land Company, and the notes executed by it, approval or disapproval, and compensation to those who had advanced the $35,000, were the only questions with respect to the purchase of the land that could have been open for the consideration of the stockholders when that motion was made and carried. At the most, the stockholders then had power only to say

that they would, or that they would not, ratify what had previously been done for the corporation, and in its name. Whatever they may have intended, they could not have changed the fact, otherwise abundantly established, that the land was in reality purchased in the corporate name.

Moreover, after the ninth of June, as before, all parties treated the notes previously executed as the obligations of the corporation. The vendors continued to hold the notes, received interest on them from time to time from the corporation, through Scott, its secretary and treasurer, and, after maturity and default, filed their bill against the corporation as purchaser of the land and maker of the notes; sold and repurchased the land, and, after application of proceeds, obtained decree for balance against the corporation alone.

Though not expressly so called in the bill and decrees in that cause, it is entirely manifest that the Clifton Hill Land Company was proceeded against as a corporation, and not otherwise. Indeed, the decree for balance now sought to be collected could be valid upon no other idea; for, a merely voluntary syndicate, company, or partnership by that name, had there been such, could have been bound only by naming the individual members thereof in the bill and decree.

As a concluding observation, with respect to the first assignment of error, it is well to say that complainants not only fail, both in their pleadings

and in their testimony, to assert that they sold their land to the defendants as partners, but they plainly negative such an idea in many ways, and distinctly state in the tenth section of their present original bill that they conveyed it to the Clifton Hill Land Company as a corporation. That statement is in these words: "The said defendant, Clifton Hill Land Company, as a corporation, is absolutely, utterly, and notoriously insolvent. It never had any assets, real or personal, except the 190 acres of land conveyed to it by complainants, Mrs. Watkins and Mrs. Shields, and that, as already shown, was never paid for by it; and, as has already hereinbefore been shown, the same has been sold at public outcry for $47,000, and bid off by complainants, Mrs. Watkins and Mrs. Shields, and, since the sale of said property, defendant company has not a cent of property of any kind left." And, in section twelve, they refer to the notes for the land as "the notes held by complainants, Mrs. Watkins and Mrs. Shields, against said defendant company."

The second assignment of error is as follows: "Treating the notes given for the purchase price of said land as those of the corporation, by adoption, the said individual defendants are, nevertheless, personally liable thereon, and the Court erred in refusing so to hold: (1) Because the corporation did not, by any perfected act, assume this liability of its promoters, or substitute itself in this respect for its promoters. (2) But if it had done so, there is no

proof of the acceptance by complainants of this substituted liability. At most, complainants only accepted the additional liability of the corporation. (3) And, in any event, the Clifton Hill Land Company never had power to do any lawful act, its charter being void for want of proper acknowledgment."

The controlling thought underlying the first and second subdivisions of this assignment is readily seen to be that of primary liability on the part of the individual defendants, as the result of their having been the original purchasers of the land, in the capacity of promoters and partners. The question there raised is substantially the same as that presented in the first assignment of error, which has just been so elaborately considered as to render further discussion of the question unnecessary. It is sufficient to say, briefly, that the pleadings do not assert, and the proof does not sustain, such a proposition. The contract of purchase was that of the corporation as such, and its liability for the purchase price was primary and exclusive, provided, only, that all preliminary steps necessary to incorporation were validly taken.

This brings us to a consideration of the third subdivision, which presents the primary ground of relief sought in the bills, viz., that the charter of the Clifton Hill Land Company was invalid, because not acknowledged before the proper officer, and that, as a legal consequence, the supposed incorporators became liable, as individuals, for the contract made in the corporate name.

There can be no doubt that persons assuming to act under a charter invalid because some positive requirement of the law has not been complied with, are liable as individuals for all debts contracted by them in the name of such corporation. Such persons so contracting in such a case, stand in the room and stead of the corporation, and must answer personally for its obligations to third persons. 2 Spelling on Priv. Corp., Secs. 832, 838; 1 Beach on Priv. Corp., Sec. 16.

The statute in force at the time the charter of the Clifton Hill Land Company was obtained imperatively required the acknowledgment of the proposed incorporators to be taken before the Clerk of the County Court of the county where the main business of the corporation was to be conducted, and permitted it to be taken by no other official. Acts 1875, Ch. 142, Sec. 3; Code (M. & V.), § 1989. The acknowledgment was, in fact, made before a Notary Public, and, for that reason, the charter was invalid. *Teasely* v. *The State* (oral); *Brewer* v. *State*, 7 Lea, 682. As a result of that defect, the incorporators at once became personally liable for the balance of the purchase price of the land conveyed to the supposed corporation. But defendants, conceding the defective acknowledgment, say that it was effectually cured, the charter made good, and all contracts and obligations of the corporation made valid, by the Act of March 10, 1890. Such, beyond ques-

tion, was the intent and meaning of that Act, whose language is as follows:

"*Be it enacted by the General Assembly of the State of Tennessee*, That all charters or articles of incorporation heretofore taken out under the general corporation laws of this State which were or have been acknowledged or proven before Notaries Public, are hereby ratified and confirmed, and shall have and possess the same validity and effect as if they had been acknowledged or proven before the County Court Clerk; and the acts, contracts, and obligations of all such corporations so organized shall have and possess the same validity, force, and effect as if the charters of such corporations had been acknowledged before the County Court Clerk." Acts Extra Session 1890, Ch. 17, Sec. 1.

Complainants deny, however, that this legislation is constitutional, and say that it cannot be held to operate so as to affect them or their rights in this case. The substance of the position is that, because of the invalidity of the charter on the day the land was conveyed to the corporation, the defendants then became personally liable for the payment of the purchase money notes; that such personal liability was a vested and fixed right of the vendors, which could not be taken away or impaired by legislative enactment, as would be the effect if the Act in question be applied in this case.

The constitutional provision upon which this contention is made is as follows: "That no retrospect-

ive law, or law impairing the obligation of contracts, shall be made." Const. Tenn., Art. I., § 20.

This does not mean that absolutely no retrospective law shall be made, but only that no retrospective law which impairs the obligation of contracts, or divests or impairs vested rights, shall be made. *Townsend* v. *Townsend*, Peck, 15 and 17; *Wynne* v. *Wynne*, 2 Swan, 205; *Collins* v. *Railroad Co.*, 9 Heis., 847.

It does not inhibit retrospective laws made in furtherance of the police power of the State; and, generally, it does not prohibit remedial legislation, nor stand in the way of statutes passed to cure some defect or omission in former proceedings or enactments, or in the case of parties attempting to comply therewith. *Ib.; Marr* v. *Bank*, 4 Lea, 585; *Knoxville* v. *Bird*, 12 Lea, 121; *Demoville* v. *Davidson County*, 87 Tenn., 223; *Munn* v. *Illinois*, 94 U. S., 113; *Beer Co.* v. *Massachusetts*, 97 U. S., 25; *Stone* v. *Mississippi*, 101 U. S., 814; Wade on Retroactive Law, Secs. 23, 257; 1 Kent, *456; 2 Story on Const., 674; Cooley on Const. Lim. (5th Ed.), 443, 448, 455–458; *Ewell* v. *Daggs*, 108 U. S., 150, 151; *Gross* v. *U. S. Mortgage Co.*, *Ib.*, 488; *Satterlee* v. *Matthewson*, 2 Peters, 412; Sutherland on Stat. Cons., Secs. 206, 207.

We quote from each of three distinguished authors:

"A retrospective statute affecting and changing vested rights, is very generally considered, in this

country, as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations. Such statutes have been held valid, when clearly just and reasonable and conducive to the general welfare, even though they might operate in a degree upon existing rights—as, a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged." 1 Kent, *455, 456.

"A party has no vested right in a rule of law which would give him an inequitable advantage over another, and such rule may therefore be repealed, and the advantage thereby taken away. To illustrate this remark, if by law a conveyance should be declared invalid if it wanted the formality of a seal; or a note, if usurious interest was promised by it; or if in any other case, on grounds of public policy, a party should be permitted to avoid his contract entered into intelligently and without fraud, there would be no sound reason for permitting him to claim the protection of the Constitution, if afterwards, on a different view of public policy, the Legislature should change the rule, and give effect to his conveyance, note, or other contract,

exactly according to the original intention. Such infirmities in contracts and conveyances are often cured in this manner, and with entire justice; and the same may also be done with defects in legal proceedings, occasioned by mere irregularities. When a Court or its officers, in a case of which the Court has full jurisdiction, have failed to observe strictly the rules of procedure which are prescribed for the orderly conduct of affairs, and, in consequence thereof, a party who was in no way injured by the irregularity, is nevertheless in position to take advantage of the error to avoid the proceedings, it is often not only just but highly proper that the Legislature shall interfere and cure the defect by validating the proceedings. And if this may be done in proceedings, which concern only private parties, it may be done in case of errors in the proceedings of corporations, and of public bodies. Retrospective legislation to cure their irregularities is not forbidden." 2 Story on Const. (5th Ed.), 674.

"If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And, if the irregularity consists in doing some act, or in the mode or manner of doing some act which the Legislature might have made immaterial by prior law, it is equally competent to make the same im-

material by a subsequent law." Cooley on Const. Lim. (5th Ed.), 458.

Referring to the subject of legislative ratification, another learned author makes this remark: "Such subsequent ratification will not only legalize the existence of a corporation formed without authority of law, and authorize the association to act in a corporate capacity thereafter, but it may also cure the illegality of corporate acts performed before the act of ratification was passed, and render such acts as valid and binding as if authority to perform them had been previously granted by the Legislature." 1 Morawetz on Private Corp. (2d Ed.), Sec. 20.

A stipulation in the face of a note for usurious interest affords the maker a perfect defense to any action for the collection of the note; yet he has no such vested right in the defense or the contract or the usury statute, as that the latter may not be repealed, and the obligation made collectible by a retrospective law. *Ewell* v. *Daggs*, 108 U. S., 150.

So, likewise, a loan of money made in one State by a corporation of another State, though not collectible at the time because then contrary to the law of the former State, may be rendered collectible by a subsequent law. The latter law, though destroying a complete defense to any suit brought for the collection of the loan, does not impair the obligation of the contract. "It rather enables the parties to enforce the contract they intended to make." *Gross* v. *U. S. Mortgage Co.*, 108 U. S., 488.

Clearly, the Act of 1890 does not impair the obligation of any contract with complainants, for they had no contract with the individual defendants. Their contract was with the corporation; hence that Act, which gives life to the corporation, effectuates rather than impairs the obligation of its contract. No more does that Act divest or impair any vested right of complainants. They had no vested right in the defect in the charter of the Clifton Hill Land Company; hence, the cure or removal of that defect did not divest or impair any vested right of theirs. The right to sue the defendants personally was not a vested right in legal contemplation. It was but a consequential right, resulting from the disability of the corporation, and not a right flowing from any contract with the individuals as such. The mutual intention was to bind the corporation, not the incorporators, for the price of the land; and no vested right could arise contrary to that intention. A law which facilitates the intention of the parties to a contract, never impairs its obligation or divests or impairs any vested right thereunder.

As forcibly remarked by Mr. Justice Washington, in an early case: "It is not easy to perceive how a law which gives validity to a contract can be said to impair the obligation of that contract." *Satterlee* v. *Matthewson*, 2 Peters, 412.

Complainants had no vested right in the law which permitted only Clerks of the County Courts to take acknowledgments to charters, nor against defendants

on account of that law. Our conclusion is, that the Act of 1890 is valid, both as a retrospective and as a prospective law. Besides, if it were held that the Act in question can operate only as a prospective law, complainants would now be estopped to assert personal liability of the incorporators upon the ground that the charter of the company was originally invalid. The continued prosecution of their vendors' bill against the company, as a corporation, after the passage of that Act, must be assumed in law to have proceeded in recognition of that Act, and upon the idea that it had validated the notes sued upon. Complainants received those notes from the supposed corporation, as their vendee, April 14, 1887; held them continuously before and after the completed organization of the company, on June 9, 1887; collected interest on them from time to time; filed their vendors' bill against the corporation in April, 1889, and prosecuted the same to final decree in this Court at the September Term, 1892, when they obtained, against the corporation alone, the decree made the basis of the present action. This course of conduct, in Court and out, running through a period of more than five years, and continuing more than eighteen months after the charter of the company and its contracts had been expressly validated by the Legislature, conclusively estops them from now claiming and obtaining relief on any theory inconsistent with the validity of the corporation or of its notes for the land.

The case of *Broyles* v. *McCoy*, 5 Sneed, 603, is

not controlling in this case, because the personal liability there enforced was predicated upon a completed written contract, executed by the defendants before any steps were taken to procure a charter.

The third and last assignment of error—that which brings forward for consideration the second or alternate aspect of the bills—is as follows: "Again, treating this liability as that of the corporation alone, the Court erred in not giving decree against said individual defendants upon their stock subscriptions to said Clifton Hill Land Company. There was no valid payment of said subscriptions."

Since the case of *Wood* v. *Dummer*, 3 Mason, 308, decided by Judge Story in 1824, it has been the general doctrine of American Courts that the capital stock of a corporation is a trust fund for the payment of corporate debts; and that, in case of insolvency, stock subscribers are liable to creditors of the company for unpaid subscriptions, so far as required for the satisfaction of its liabilities. *Sawyer* v. *Hoag*, 17 Wallace, 611; *Ohio Life Ins. Co.* v. *Merchants' Ins. Co.*, 11 Hum., 31; *Wetherbee* v. *Baker*, 35 N. J. Eq., 501; *Sawyer* v. *Upton*, 91 U. S., 60; *Thompson* v. *Bank*, 3 Am. St. R., 797, and note p. 808; *Kelley Bros.* v. *Fletcher*, 94 Tenn., 1; Cook, S. and S., Sec. 199; 2 Morawetz, Pri. Corp., Sec. 780; 1 Beach, Pri. Corp., Secs. 113–116; Thompson's Liab. Stockh., Sec. 10; Taylor, Pri. Corp., Secs. 701–704; 2 Spelling, Pri. Corp., Sec. 784.

Conceding this doctrine, defendants say that it is available only to those persons whose debts were contracted after subscription made, and in reliance upon it, and that it cannot be successfully invoked by these complainants, because their debt was created before the capitalization of the company, and before any subscriptions to stock were made.

Counsel for complainants admit the facts stated, but dispute the legal proposition. They contend that the true reason of the doctrine is, that unpaid subscription to capital stock is the property of the corporation, liable in the last resort to the payment of all of its just debts; that, being such, it stands upon the same ground, with respect to creditors, as any other corporate property; and, like any other property, may be subjected, in case of insolvency, to antecedent and subsequent debts alike.

It is further said that if corporate creditors can be denied resort to stock subscriptions, because made after the creation of their debts, they may, upon the same reasoning, be denied resort to any other after-acquired property; that there is no difference, in this respect, between the liabilities of corporations and of natural persons; that, inasmuch, as in case of credit extended to a natural person, the creditor has a right to look not only to the property he then has, but also to all that he may thereafter acquire, the corporate creditor should have the same right; and, finally, that all property of natural or artificial persons, whenever or however acquired, un-

less expressly exempted by law, is liable for all valid debts of the one or the other whenever created.

Those are very forcible views, and, were the question a new one, we would adopt them as the surest means of doing justice in every case. The doctrine seems, from its inception, however, to have been rested on actual or presumed reliance by the creditor, at the time his debt was created, upon the then capital stock of the corporation for payment. *Wood* v. *Dummer*, 3 Mason, 308; *Adler* v. *Brick Co.*, 13 Wis., 60; *Allen* v. *Montgomery R. Co.*, 11 Ala., 437; *Wetherbee* v. *Baker*, 35 N. J. Eq., 501; *Sawyer* v. *Upton*, 91 U. S., 56; *Sawyer* v. *Hoag*, 17 Wallace, 611; *Hospes* v. *N. W. Mfg. & Car Co.*, 5 Am. R. R. & Corp. Rep., 570; 2 Morawetz, Pri. Corp., Sec. 781; *First Nat. Bank* v. *Mining Co.*, 18 Am. St. R., 516 (S. C., 42 Minn., 327), and other cases too numerous to mention.

In the last case, the Court said: "While the Courts have not always had occasion to state the limitation upon the doctrine that 'the capital stock is a trust fund for the benefit of creditors,' yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders, it has been in favor of creditors becoming such afterwards; and hence, fairly to be presumed as relying upon the amount of capital which the company was represented as having." 13 Am. St. R., 516.

In a late case, the Supreme Court of the United States said: "We have no doubt the learned Circuit Judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against the stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock." *Handly* v. *Stutz*, 139 U. S., 435.

But the rule of nonliability of stockholders for antecedent debts does not apply where the amount of capital stock is definitely fixed in the charter, for, in that case, the creditor is presumed to have contracted with reference to the charter capitalization. 2 Morawetz, Sec. 781.

The "trust fund doctrine," as thus far considered, may well be termed the American common law on the subject, originated, developed, and enforcible by the Courts of Equity in this country. Many of the States have statutes on the subject, some of which are merely declarative of that common law, some restrictive in their nature, and others more comprehensive and imperative. The Tennessee statute is in these words: "The amount of any unpaid stock due from a subscriber to a corporation shall be a fund for the payment of any debts due from the corporation; nor shall the transfer of stock by any subscriber release him from payment, unless his transferee has paid up all or any of the balance due on said original subscription." Acts 1875, Ch. 142, Sec. 5, p. 237; Code (M. & V.), § 1708.

This provision was properly incorporated into the charter of the Clifton Hill Land Company, and is binding on all stock subscribers. What does it mean? What is made a fund for the payment of debts? "Any unpaid stock." What debts are contemplated? "Any debts due from the corporation." "Any unpaid stock" means all unpaid stock, and "any debts due from the corporation" means all debts due from the corporation—that is to say, all unpaid stock shall be a fund for the payment of all debts of the corporation. No subscriber for unpaid stock can escape liability, and no corporate debt shall go unpaid, so far as the capital stock is concerned. The liability attaches to all subscribers; the security extends to all creditors. No subscriber whose stock remains unpaid can escape liability, and no creditor who has a valid debt can be denied his security. Nothing is said in the statute with respect to the time the subscription shall be made, nor as to the time the debts shall be created. No limitation is made in either case. The clear and plain meaning of the statute is that all unpaid stock, whenever subscribed, shall be a fund for the payment of all corporate debts, whenever created.

Under this statute, it is clear that all subscribers to stock in the Clifton Hill Land Company would be individually liable, in a proper proceeding, for the debt of complainants to the extent that their respective subscriptions may be shown to remain unpaid. A similar statute was so construed

by the Supreme Court of Illinois in the case of *Root* v. *Sinnock*, 120 Ill., 350 (S. C., 60 Am. R., 558). See also 2 Morawetz, Sec. 870.

Some of the defendants, notably Catchings and Richardson, deny that they were ever subscribers for any part of the stock in the Clifton Hill Land Company, and all of them say that all the stock has been fully paid.

The proof on the issue of payment is, that certain of the defendants, collectively, furnished the aggregate sum of $35,000 in money, which was used by Lyerly in making the cash payment on the land before the Clifton Hill Land Company was actually incorporated; and that, on the ninth of June following the incorporation, the stockholders took the action indicated by the following entry upon the minutes: "On motion of John A. Hart, it was resolved that this company buy from the original purchasers of the Watkins farm all their interest therein, and pay them, in paid-up stock of this company, the sum of $250,000, and assume their liability of $90,000 as due Mrs. Watkins, the original vendor."

So far as the question of payment is concerned, this action of the stockholders can have no other meaning, in law, than that the company was to give those particular defendants $250,000 of paid-up stock for their equity in the land, or against the corporation, by reason of the fact that they had so furnished the $35,000 already mentioned. It

cannot mean in legal contemplation, nor was it in fact intended to mean, that such persons were selling the land itself to the company and taking as consideration therefor the $250,000 of paid-up stock; for, as we have seen heretofore, the land was already the property of the corporation, subject to the lien for unpaid purchase money. That the parties concerned might then reasonably have considered the land, incumbered as it was, as fairly worth $250,000 in cash, or even more, is satisfactorily established by the proof, hence there could be no doubt, in view of the settled rule that property needed by the company may be taken at a fair valuation in payment of stock subscription (*Kelley Bros.* v. *Fletcher*, 94 Tenn., p. 1), that if the subscribers had been vendors of the land, the stock was in fact fully paid; but whether the mere equity of the contributors of the $35,000 used for the cash payment could properly have been given so large a purchasing value is quite a different question. It is clear to our minds that the company had the legal right to issue full paid stock in extinguishment of that equity, yet the record fails to show that it was worth so much as $250,000.

But it is said that the question of overvaluation is not raised in the pleadings, and that, for that reason, it cannot be considered by the Court. It is plain law, that a contract whereby a corporation receives needed property in the payment of stock subscription, is presumed, in the first instance, to be

valid and binding upon all parties concerned; and that it must stand as made, and operate as intended, until impeached by appropriate pleading and proof. *Phelan* v. *Hazard*, 5 Dillon, 50; *Clow* v. *Brown*, 31 N. E. Rep., 362; *Coit* v. *Gold Amalgamating Co.*, 119 U. S., 345; *Kelley Bros.* v. *Fletcher*, 94 Tenn., 1.

The allegation in the original bill before us is as follows: "Complainants are informed and charge that those who subscribed for stock in the defendant company have paid very little upon their stock subscription, and perhaps some have paid nothing at all. Complainants are informed that one or more small assessments were made upon the stock subscribers, which were paid, at least in part, said stock assessment being levied for the purpose of collecting money from the subscribers to pay the annual interest due upon the notes held by complainants, Mrs. Watkins and Mrs. Shields, against said defendant company; and that, with this exception, none of said stock subscriptions have been paid in, and the same are due and owing to the corporation."

This is merely an allegation of nonpayment, and is not claimed to have been intended for more. It does not even refer to the transaction whereby the stock was paid, and can, by no construction, be taken as an impeachment of it. Hence, under the authorities last cited, the question of overvaluation cannot be considered, but the Court must assume, upon this record, that the equity of the subscrib-

ers in the land was worth as much as the par value of the stock, that being the price at which it was taken, and that the subscriptions are full paid. The question of pleading was elaborately considered in *Kelley Bros.* v. *Fletcher*, *ante*, *p. 1.*

Let the decree be affirmed.

DISSENTING OPINION.

WILKES, J. I cannot concur with the opinion of the majority in this case. The very late hour of the term at which the able and elaborate opinion of the majority was prepared and presented, will not admit of any elaborate presentation of my individual views of the question involved, having had only a portion of the morning to prepare this paper.

So far as the result of this case is concerned, these views have no value, as I stand alone, and I state them with the utmost deference for the views of the majority, but I deem it incumbent to briefly express these views in view of the fact that almost daily questions of a similar character are being presented to the Court in connection with the collapse of nominal, not to say fraudulent, corporations, and the winding up of boom speculations, in which promoters and parties interested seek to escape personal liability upon technical grounds.

I am of opinion that the individual defendants in this case are personally liable, as parties composing

the purchasing syndicate known as the Clifton Hill Land Company, for the balance of the purchase money for the Oakland farm, after exhausting the proceeds of the land upon which the lien was retained, and that complainants, under their pleadings, are entitled to a recovery.

This property, in my view of the case, was purchased by the syndicate when they accepted the Lyerly option previous to February 28, 1887, the date when that option expired. It was certainly purchased by some one during the life of that option, and it could not have been by the corporation, because no steps to organize that was taken until March 17, 1887, nor was there any organization thereunder, nor any stock subscribed until June 9, 1887. Until the latter date, the corporation had no officers, no agents, no stock, no life, no final determination to incorporate.

The syndicate became the equitable owner of the land, and its members equitably bound for the purchase money, whatever may have been their liability in an action at law for want of a direct promise on the part of each to pay.

The notes executed April 14, 1887, clearly indicate, to my mind, that the purchase was that of the syndicate, and the notes of the members of the syndicate, and not of the corporation, which then had no legal existence, no organization, no stock, nothing but a void charter not then accepted.

E. Watkins, at that date, was president of the syndicate, but not of the corporation, for he did not

become president of the corporation until two months afterward, and the note signed by him as president of the Clifton Hill Land Company, was the note of the partnership of that name, and not of the corporation which subsequently organized under that name. But if any doubt remains upon this point it is entirely removed by the action of the stockholders on June 9, 1887, when, on motion of John A. Hart, it was resolved that this company, that is, the corporation, buy from the original purchasers of the Watkins farm all their interest therein, and pay them therefor, in paid up stock of this company, the sum of $250,000, and assume their liability of $90,000, as due to Mrs. Watkins, the original vendor. It is clear from this, that the land was bought from Mrs. Watkins by the partners, and not by the corporation, and that the corporation bought from the promoters, and agreed to pay them in stock for the purchase.

With all due respect for the exceedingly able opinion of the majority, I think it proceeds upon an erroneous idea in holding that certain acts done and transactions made were the acts of the corporation, when, as a matter of fact, they were the acts of the individuals operating under the name of the Clifton Hill Land Company, as a partnership designation, before it was incorporated under the same name. In my view, the corporation, as such, did no act to connect it with this transaction until the ninth day of June, 1887. Up to that time,

all that was done was done as individuals, and not as a corporation. The change to a corporation was made June 9, 1887, when the shrinkage in value had set in, and it was important to interpose the corporation to shield from individual liabilities. No one but these promoters had any interest in the land, or had incurred a liability to Mrs. Watkins for the purchase money, up to that time.

We have not the opportunity to carefully analyze the pleadings in the two cases with a view of showing that complainants all the time have proceeded upon the idea of the original liability of the partners individually, supplemented by that of the corporation after it came into existence.

The substance of it all is, that complainants insisted all the time upon individual liability, and the main contention by them was that the subsequently formed void corporation could not relieve from this liability. I think there is an utter absence of proof that the defendants stipulated against individual liability, nor do I understand the opinion of the majority to so hold or intimate.

In this connection I remark that I can place but little weight upon the acts of Mr. J. A. Caldwell as working an estoppel upon complainants. If he was agent for them, he was at the same time agent and attorney for the defendants individually and as a corporation.

The formation of the corporation did not relieve the individuals, but the corporation assumed the debt

of the individuals, and, as to the creditors, became surety for the individuals.

In *Broyles* v. *McCoy*, 5 Sneed, 602, this Court said: "It is well settled that when an association which has existed as a mere copartnership, becomes incorporated, and the corporation then accepts an assignment of all the property of such association for the purpose of carrying out their object, they are primarily and jointly and severally liable for all the debts incurred before the act of incorporation. In such a case, the responsibility of the corporation for contracts previously made with the association does not become substituted so as to exempt the members from individual liability; and it does not change the case if the members of the company had it in view to procure a future Act of incorporation when it was first formed."

This case has been often approved in our own Courts and the Courts of other States, and is, I think, conclusive of this feature of the case.

I do not deem it important to dwell upon that feature of the case which seeks to hold the members or stockholders, upon the idea that the charter is void. Upon this point I virtually agree with the majority.

In the second place, I am of opinion that the individual defendants who were stockholders of the defendant corporation are severally liable upon their respective subscriptions to the capital stock of the corporation, in a sum sufficient to pay the balance

of the purchase money due the complainants, the said stock being for the most part unpaid.

The Act of 1875, Ch. 142, Sec. 5, p. 237, contains a provision in these words: "The amount of any unpaid stock due from a subscriber to the corporation, shall be a fund for the payment of any debts due from the corporation; nor shall the transfer of stock by any subscriber relieve him from payment, unless his transferee has paid up all or any balance due on said original subscription." Code, § 1708.

This provision is incorporated in the charter of this corporation, and is binding on all subscribers for stock. I think the language of the statute and charter is clear and plain, and that all stock, whenever subscribed, is liable for all debts whenever contracted. The charter virtually declares on its face, to the world, that when the stock shall be subscribed and paid, it will constitute a fund for the payment of the debts of the corporation. Independent of the statute, the same rule results under the general principles of equity and the trust fund doctrine. All unpaid original subscriptions are assets for the payment of debts. I need not consider the question where there is an increase of stock after the original subscriptions are paid. In this case, however, the stock was subscribed at the same time and by the same instrument under which the corporation assumed the debt. I think the fact abundantly shown that the capital stock of this company

had been fixed and subscribed before complainants extended credit to it, or at the time the contract was assumed by the corporation. We have neither time, nor would it serve any useful purpose, to dwell upon this feature of the case.

Upon the general doctrine of the liability of the stockholders for unpaid subscriptions, I understand that I am in accord with the majority, and that I differ only in the application of the doctrine to the facts in this case. The remaining question is whether the defendants are liable for any unpaid subscriptions. As I understand the opinion of the majority, they are not, because their stock has been paid in full in property which the stockholders agreed to receive in satisfaction of the subscriptions, and whether this was a *bona fide* actual payment cannot be questioned, inasmuch as the stockholders agreed to so regard it, unless the transaction shall be directly impeached for fraud by proper allegations in the bill. In other words, it matters not what fictitious values shall be placed upon property received in payment of stock, it will be treated as payment if the stockholders so regard it, and it cannot be questioned except upon an allegation of a fraudulent combination and purpose upon the part of the stockholders.

It is well settled that corporations may receive in payment of stock subscription property which it may lawfully purchase, and which is suitable and applicable to the purposes for which it was organized, but it must be taken in good faith, at its fair,

bona fide value. *Searight et al.* v. *Payne*, 6 Lea, 285; *Albitztigui* v. *Quadalupe Mining Co.*, 8 Pickle, 605.

The transaction must be free from fraud. The property must be of such character and value that the corporation would be authorized to purchase it with money if the stockholders had first paid the amount of their subscriptions into the treasury of the company. It must be received at money's worth, and, if it have no settled and ascertained value, it cannot be received at all, unless under special circumstances. Morawetz on Cor., Secs. 425, 426, 428, and 825; Cook on Stockholders (2d Ed.), Sec. 13; *Camden* v. *Stewart*, 144 U. S., 105. The fraud most frequently practiced in such transactions is to put a grossly exaggerated value upon the property conveyed to the corporation. Mr. Cook, in his work on Stock and Stockholders, says that the method most frequently resorted to in schemes for issuing watered stock, or stock as paid up when it is not, is that of conveying to corporations property at an overvaluation. He further says that fraud of this character in issuing stock is the most difficult to prove and the least easy to remedy. Cook on Stockholders, Sec. 35 (3d Ed.). It has been repeatedly held, in cases where it appears that the overvaluation was intentional, that that fact alone was sufficient evidence of its fraudulent character, and made out a case for relief. Cook on Stockholders (3d Ed.), Secs. 45–47 (note

on page 72). In a case where property worth $64,000 was transferred in payment of stock to the amount of $300,000, the Court held, as a presumption of law, that the transaction was fraudulent. *Douglass* v. *Ireland*, 73 N. Y., 100. Where stock worth $100,000 was issued for property worth $50,000, in the absence of evidence to explain it and rebut the presumption of fraud, the Court held the transaction was fraudulent. *Boynton* v. *Andrews*, 73 N. Y., 93.

Indeed, this case will come within the doctrine laid down in *Camden* v. *Stewart*, where it is held that, if the property turned in is practically worthless, or is unsubstantial and shadowy in its nature, the Court will hold that there has been no payment at all, and that the stockholders are liable on the stock. *Camden* v. *Stewart*, 144 U. S., 104.

But it is said that, unless the transaction is impeached for fraud, directly and pointedly alleged in the pleadings, the question of overvaluation cannot be made effectual. In other words, the subscribers say: "We are stockholders, and have paid for our stock." "How have you paid it?" "In property." "Did you pay that property in at its fair cash value, as the statute prescribes?" "I need not answer that further than to say my associates agreed to receive it as payment, and it must stand as such, unless you impeach it for fraud on my part and that of my associates."

This rule may apply between the stockholders,

but it should not prevail as against creditors. I am ready to concede that fraud may be charged, and should be, in all proper cases, and the question thus raised; but I do not think relief can be denied because of the failure to charge fraudulent overvaluation, where the proof abundantly shows fraud or an excessive overvaluation. The plea in this case is payment. The burden of proving it is on the party setting it up. It devolves upon him to affirmatively show payment. This he can do by showing that money was paid. It may also be sustained, under the statute, by showing that property instead of money was paid; but it must be property at a fair cash valuation.

It is as much incumbent on the defendant to show the fair cash valuation of the property as it is to show that the property was paid. Until that is done the plea of payment is not sustained. As between themselves, the stockholders may agree that they will treat even a simulated payment as such, but as against creditors this should not be allowed to prevail. The true rule is to credit the stockholder with the fair cash value of his property upon his subscription, and require him to pay the balance in cash, at least to the extent of the demands of creditors. A margin may, and should, be allowed for honest differences of opinion as to values, but when an overvaluation is grossly excessive and intentionally made, even though there is no actual fraud, it is invalid as to corporation creditors, who

may proceed against the stockholders individually for their unpaid stock subscriptions.

The case of *Elyton Land Co.* v. *Birmingham Warehouse and Elevator Co.*, 92 Ala., 407 (S. C., 25 Am. State Rep., 65), is an able presentation of this doctrine, and, in my opinion, correctly lays down the law as far as this feature is involved. It is there held that any arrangement between stockholders and the corporation to issue stock as fully paid, though only partly paid in fact, either in money or property, and by which the corporation does not get the benefit of the full price of the stock in good faith, may be valid and binding between the stockholders and the corporation, but it is invalid as to creditors, and may be set aside at their instance, and full payment of the stock enforced for the satisfaction of corporate debts.

In that case, parties organized a corporation with a capital stock of $250,000, and gave in payment therefor, without actual fraud, a bond for title for land worth $50,000, and for which they had only paid $5,000 in part, the corporation assuming the balance of the purchase money. It was held that the stockholders were liable to the creditors of the corporation to the extent of the differences between the actual value of the property and the amount of their subscriptions. The statutory provision for payment of capital stock in property at its money value is substantially the same in Alabama as in this State. See the authorities cited in this case, and

the rule as laid down in Cook on Stock and Stockholders sharply questioned. In the Alabama case it was insisted that fraud should be charged and proved, but the Court said the statements of fact in the bill support the conclusions therein averred that the transaction by which payment for stock was attempted to be made was only colorable; that it was not really a payment, but had only the outward appearance without the substance of payment. Such being the case, the individual defendants are still liable on their stock subscriptions to the extent that the attempted payment falls short of a *bona fide* compliance with the terms of the contract, and the allegations as to excessive valuations of the property were sufficient under the rules above stated. To the same effect see *Crawford* v. *Rohoer*, 59 Md., 599; *Carr* v. *Lefere*, 27 Pa. State, 413; *Scoville* v. *Thayer*, 105 U. S., 143; *Jackson* v. *Traer*, 64 Iowa, 469 (S. C., 52 Am. Rep., 449); *Osgood* v. *King*, 42 Iowa, 478; *Douglass* v. *Ireland*, 73 N. Y., 100; *Witherbee* v. *Baker*, 35 N. J. Eq., 501; *Bailey* v. *Pittsburg Coal Co.*, 69 Pa. State, 334. See also 78 Wis., 427; 23 Am. State Rep., 417; 3 Am. State Rep., 817; 124 N. Y., 302.

The cases relied upon in the opinion of the majority of the Court are commented on in this case of *Elyton Land Co.* v. *Birmingham Warehouse and Elevator Co.*, 25 Am. State Rep., 65–83, and, I think, with fatal effect.

The case of *Kelley Bros.* v. *Fletcher*, 94 Tenn.,

1, decided at the present term, did not meet my approval, and I reserved the right to file a written dissent, and I make this my dissent in that case as well as in this on the points involved.

Now, in the case at bar we have this remarkable condition of affairs: The defendants plead payment of a subscribed capital stock of $250,000. To sustain this, they show they have actually paid $35,000 in cash, and have transferred to the corporation property which had been bought for $125,000, and on which there was an incumbrance of $90,000, with only $35,000 paid in cash. It is well to remember that the stockholders do not assume this incumbrance of $90,000, but attempt to shift it to the corporation as a debt of the corporation. Even if the property had not depreciated, then the defendants would be in the attitude of paying up their capital stock of $250,000 with $35,000 in actual money, and the property actually put in as payment was thus overvalued, even on its "boom price." But it abundantly appears that, when this transaction took place, the property had already depreciated more than the cash payment. The boom had collapsed, and the shrinkage was on in full vigor, and to the full extent of the cash payment; so that we have these gentlemen, who bought this property as individuals, putting into a corporation for $250,000, not the property itself, but only their equity in it arising out of the $35,000 cash advanced upon it, which, in view of

the shrinkage, was absolutely nothing. This does not constitute payment, and is, in my view, a clear evasion of the statutory requirement.

It is said that some of the parties did not intend to, nor did they, actually subscribe for stock, but they were under the impression that they were only stockholders to the amount actually paid in on the cash payment. And yet, these same parties, after the cash payment had been made, paid assessments, and knew that a balance was to be paid on the purchase money. Suppose this $90,000 of purchase money unpaid had been actually paid afterwards, would these parties have insisted that they had no further stock interest by virtue of such payment, but that their stock was still only the amount of the cash paid in?

I am thoroughly convinced that complainants in this case are entitled to their recovery in this case on the best and safest rules of law and equity. It was said in argument that it would be inequitable to hold these defendants, all of whom are business men of the highest order, liable for the fictitious value of this property, depending on the boom inflation of value. But it is equally against good conscience to deprive these ladies, who are not prominent business men, of the price which the proof shows they could have realized from the property from other parties during the continuance of the boom, but which they were prevented from receiving by the existence of this contract with the defendants.

MARTIN *v.* BANK.

(*Knoxville.* November 23, 1894.)

1. INNOCENT PURCHASER. *Who is not.*

The holder of negotiable coupons, who acquires them after maturity as collateral security for a pre-existing debt, takes them subject to all equities available against the party from whom he obtained them. (*Post, pp. 180, 181.*)

Cases cited and approved: King *v.* Doolittle, 1 Head, 77; Rhea *v.* Allison, 3 Head, 176; Ferris *v.* Tavel, 87 Tenn., 386.

2. BONDS AND BONDHOLDERS. *Priority of satisfaction.*

Bondholders of a corporation who have presented their matured coupons for payment, and have received payment thereof, and have been led to believe that the coupons were thereby canceled and extinguished, are entitled to priority of satisfaction for their remaining bonds and coupons, equally secured by the same mortgage, over a person who advanced the money to take up such matured coupons, under an agreement with the maker not disclosed or assented to by the bondholders, that the coupons taken up should remain in his hands uncanceled as security for his advances. (*Post, pp. 181–185.*)

Cases cited and approved: 63 N. Y., 311; 24 Am. & Eng. R. R. Cases, 203; 32 Md., 501; 20 N. Y., 398; 7 N. H., 100; 6 Johns. Ch. R. (N. Y.), 423; 128 U. S., 416; 138 Penn. St., 494.

Cited and distinguished: 96 U. S., 659.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.

T. M. MCCONNELL, Ch.

THOMAS & ELDER for Martin.

PRITCHARD & SIZER for Bank.

MCALISTER, J. The object of this bill is to subject the proceeds of certain trust property to the ratable payment of two first mortgage coupons held by complainants. It appears that on the twenty-eighth of August, 1890, the Arlington Land & Improvement Co. executed a deed of trust to the Citizens' Bank & Trust Co. of Chattanooga, as trustee, to secure a series of bonds issued by the former and amounting to fifty ($50,000) thousand dollars. Two of these bonds, amounting to ten thousand dollars, with their semi-annual coupons, to which class the coupons in suit belonged, were given priority in the trust deed. Default having been made in the payment of some of the interest coupons, the principal and interest of all the bonds became due and payable as provided in the trust deed. Thereupon the trustee advertised the property and sold it for $11,200. Defendant trustee exhibits a statement showing the disposition made by it of the proceeds of the sale of the trust property, from which it appears that only forty-four dollars and sixty-five cents remained in its hands after paying off the first mortgage bonds with interest from the maturity of the coupons, the expenses of sale and compensation to itself as trustee and to its attorneys. The coupons in suit were not paid by the trustee. It appears from the record that one G. Lord, of New

York, was the owner of the entire series of first mortgage bonds and coupons, amounting to $10,000. Complainants held two of the first mortgage coupons, amounting to $324.30, and claimed to be entitled to payment *pro rata* with G. Lord in the proceeds of the trust sale. The trustee bank refused to recognize the demand, and paid over the entire proceeds of sale, less expenses, to Lord. As already stated, the object of this bill is to recover the *pro rata* alleged to be due complainants out of the proceeds of the trust sale.

The Chancellor pronounced a decree in favor of complainants. The Citizens' Bank & Trust Co. appealed and has assigned errors.

The coupons in question became due on August 28, 1892, and were sent by G. Lord's estate to the trustee bank for collection. The land and improvement company had provided no money for their payment, and J. M. Goad, the secretary, treasurer, and general manager of the company, requested Henson, president of the trustee bank, to hold up the coupons until he could get some money from the stockholders with which to pay. Henson replied: "Well; you have spoken of getting some extension on the bonds, and if you are going to get any extension on the bonds, you had better raise the money to pay the interest without delay." Thereupon Goad informed Henson that he would pay the coupons out of his individual means, and hold them against the company as security for advances made

by him. Henson accepted the money for the trustee bank, and, upon Goad's request, turned over to him the coupons uncanceled. Complainants, Martin and Smith, charge that two of these coupons were turned over to them by said Goad on February 20, 1893, nearly six months after they matured, in consideration of complainants surrendering a solvent collateral note on Goad & White, and postponing suit on two other notes they held against Goad.

The proof shows that, before agreeing to accept the coupons, complainants, by their counsel, inquired of the cashier of the trustee bank whether the coupons had been paid, and were informed that the books of the defendant bank would not show, but that the books of the Arlington Land and Improvement Company ought to show. The books of the latter corporation were examined, and did not show payment of the coupons. Whereupon, complainants accepted them from said Goad.

It appears that, after complainants became the owners of the coupons, and prior to the foreclosure sale, the trustee bank was notified, in writing, that complainants held them, "in order," says the notice, "that the same may be provided for and taken care of in case of your foreclosure of the property." The trustee bank assumed the position that when Goad advanced his money and took up the coupons, that was a payment so far as the bondholders were concerned. The insistence of the trustee bank is that, while the coupons may have

been surrendered to Goad without cancellation, it was not with any intention of keeping them alive as against the bondholders. Defendant further insists that, as complainants did not advance any money on the coupons, but took them simply as collateral security on a pre-existing debt, complainants could not have sustained any loss through any statements defendant's cashier may have made. The argument that complainants gave up a valid security at the time they accepted the coupons in controversy finds no anchorage in the record. It affirmatively appears from the testimony of complainants that they surrendered the Goad & White note before Goad ever tendered them the coupons. Moreover, the bill itself shows that complainants were not, in a legal sense, *bona fide* purchasers of these coupons. It avers that Goad was indebted to complainants by certain notes, one maturing February 16, 1893, and the other February 23, 1893, and that on February 20, 1893, in consideration of foregoing, for the time, suit on these notes, and of an extension thereof, complainants acquired these coupons.

The authorities are that one who takes a note, either in payment of, or as a security for, a pre-existing debt, is not a *bona fide* holder. *King* v. *Doolittle*, 1 Head, 77; *Rhea* v. *Allison*, 3 Head, 176; *Ferris* v. *Tavel*, 3 Pickle, 386.

It is clear, therefore, that complainants parted with nothing at the time the coupons were acquired, and they have sustained no damage, assuming the

coupons were of no value whatever. Nor do we find anything in the record upon which an estoppel can be predicated against the bank.

The case therefore turns upon the single inquiry whether, in view of the circumstances surrounding this transaction, Goad himself, the assignor of the coupons, would have been entitled to share ratably with the bondholders in the proceeds of the trust sale. The complainants have no better title to the coupons than that possessed by Goad, since, first, the coupons were past due when they acquired them, and, second, they accepted them as security for a pre-existing debt. We are of the opinion that whatever rights complainants may have in the surplus fund, or against the Arlington Land Company, such rights are subordinate to the rights of the holders of the bonds and the subsequently maturing coupons. The insistence of complainants' counsel is that when Goad, the secretary of the land improvement company, advanced his individual means, and the coupons were delivered to him by the bank uncanceled, the transaction did not amount to a payment of the coupons, but to a purchase of them by Goad, and that the lien on the trust property was preserved. The cases on this subject are somewhat contradictory, and perhaps irreconcilable. We, however, approve the rule as laid down in the following authorities:

Jones, in his work on Corporate Bonds and Mortgages, Sec. 249, says, viz.: "Coupons which bondholders presented for payment, and which they

had reason to believe were paid by the company, are not entitled to share in the proceeds of sale as against such bondholders, although they were in fact taken up by one who advanced the money under an agreement that they were to be delivered to him uncanceled as security for the advances. The bondholders have a direct interest in having the coupons paid, so as to preserve the value of their security."

Among other cases cited by the author in support of the text, is the case of *Union Trust Co. of New York* v. *The Monticello & Port Jarvis Railroad Co.*, 63 New York, 311. In that case, it appeared that one Smith had made an agreement with a railroad company to advance the money to pay coupons on the company's bonds when they should become due, holding the coupons for security. In pursuance of the agreement, he went to the plaintiff, where the coupons were payable, and left with it the money to pay the coupons when presented, it agreeing with him to take and deliver them to him uncanceled, that he might hold them as security for the money advanced. It was held that Smith was not entitled to share ratably in the proceeds of the mortgage to secure the bonds and coupons with other bond and coupon holders. As against the railroad company, the person who advanced money for the coupons in this way could enforce the mortgage.

Again, in the American & Eng. Ency. of Law, Vol. IV., page 441, the rule is stated as follows: "As against bondholders who have presented their coupons

for payment, and not for sale, and who had the right to assume they were paid and extinguished, a person who advances the money to take them up, under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled, as security for his advances, is not entitled to equal priority in the lien or the proceeds of the mortgage by which the coupons are secured. *Cameron* v. *Tome*, 24 Am. & Eng. R. R. Cases, 203; *Virginia* v. *Chesapeake & Ohio Canal Co.*, 32 Md., 501; *Harbeck* v. *Vanderbilt*, 20 New York, 398; 7 N. H., 100; 6 Johns. Ch. (N. Y.), 423. See also Beach on Corporations, Vol. II., Sec. 666."

Sheldon, in his work on Subrogation, Sec. 243*a*, states the rule thus: "Where matured coupons of secured bonds of a railroad, or other corporation, are taken up with money furnished, without the knowledge of the bondholders, by a third party, without any assent on the part of the bondholders that this transaction should be regarded as a purchase of the coupons, they will not afterwards, in the hands of such third party, be allowed to share in the security to the prejudice of the bondholders. If the coupons have been paid, on presentation at the place of payment, with the money of a third party, a private arrangement between him and the debtors that he should be regarded as the purchaser of the coupons will not be enforced against the bondholders. Such a voluntary act will be regarded as a payment, not as a purchase, unless so intended by all the parties. *Wood*

v. *Guarantee Trust Co.*, 128 U. S., 416; *Fidelity Co.* v. *West Penn. Railway Co.*, 138 Penn. St., 494."

The case of *Ketchum* v. *Duncan*, 96 U. S., 659, relied on by counsel for complainants, bears very little resemblance to the case at bar. It was held by a majority of the Court that the facts of that case made out a purchase, and not an advance of money either to or for the benefit of the debtor corporation, and that the transaction did not amount to a payment of the coupons.

It distinctly appears in this record that Mr. Goad, as secretary and treasurer, advanced for the company the money with which these coupons were taken up, and held them, uncanceled, as security against the company for the money so advanced. It appears from the evidence of Mr. Goad that, when he called on the trustee bank and requested tnat the coupons might be held up until he could get some money from the stockholders with which to pay them, he was acting in his official capacity as secretary and treasurer of the company. When Henson, the president of the bank, stated to him that, if he desired an extension of the bonds, he had better raise the money to pay the interest without delay, Goad states that he then went and raised the money—"that is, I put my own money in, and told him that I would pay them out of my money, and he then turned the coupons over to me not stamped paid, and I held them against the company as security for my advance."

We cannot doubt, in the light of this evidence, that, so far as the bondholders were concerned, this transaction amounted to a payment of the coupons and an extinguishment of the lien upon the mortgaged property. Goad, of course, had a right to hold the coupons against the company as security for the money advanced. Complainants, who acquired these coupons from Goad, will also be entitled to the same relief against the Arlington Land & Improvement Company, but will not be entitled to participate in the proceeds of the trust sale further than to receive the surplus on hand, amounting to forty-four dollars and sixty-five cents ($44.65).

The decree of the Chancellor in favor of complainants for the *pro rata* of said coupons in the net fund realized from the sale of the trust property after deducting the expenses and compensation charged by defendant, is reversed, but in all other respects affirmed.

CLAPP *v.* STATE.

(*Knoxville.* March 4, 1895.)

1. ACCOMPLICE. *Correct definition of.*

An accomplice is correctly defined to be a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. (*Post, p. 194.*)

2. SAME. *What corroboration essential.*

It is not essential that the corroboration of the testimony of an accomplice should be equivalent to "the swearing of one credible witness." The corroboration is sufficient that satisfies the jury of the truth of the accomplice's statements. It must confirm the accomplice's statements, not only as to the commission of the offense, but as to the defendant's connection with the crime. (*Post, pp. 194–196.*)

Cases cited and approved: Robison *v.* State, 16 Lea, 146; Hall *v.* State, 3 Lea, 564; 104 N. Y., 591; 34 Am. R., 391; 109 N. Y., 267.

3. CRIMINAL PRACTICE. *Cross-examination of defendant.*

The defendant in a criminal case cannot be compelled to answer on cross-examination over his objection whether he had committed an offense other than that for which he is on trial, (*Post, pp. 199–201.*)

4. SAME. *Subjecting jury to improper influences.*

When the jury in a criminal case has been exposed, in its selection and during the trial, to improper influence, this Court will reverse, in the absence of the fullest and most satisfactory explanation, although it may not affirmatively appear that defendant suffered any prejudice. (*Post, pp. 201, 202.*)

FROM CLAIBORNE.

Appeal from Circuit Court of Claiborne County. W. R. HICKS, J.

W. A. OWENS and W. P. GILLENWATERS for Clapp.

Attorney-general PICKLE for State.

McALISTER, J. The plaintiff in error was indicted in the Circuit Court of Claiborne County for the murder of James Cunningham. At the May term, 1894, of said Court he was put upon trial, convicted by a jury of the crime of murder in the first degree, and sentenced by the Court to suffer death by hanging. The prisoner appealed.

On Sunday evening, December 3, 1893, the body of James Cunningham, a respectable white citizen of Claiborne County, was found on the floor of his late residence. The deceased was a single man who had never been married, and lived by himself in an unpretentious dwelling in an out of the way place, about twenty feet from the Hooper road. He was an industrious man, and had accumulated some property, consisting of land, hogs, cattle, and money. Prior to his death he was known to have three hundred dollars in paper currency, a purse of silver, and a small amount of gold. The sum of $55 in gold was found in his house after he was killed. When discovered, the deceased was lying on the floor, his head, still covered with his hat, was resting on his wrist with a part of the hat between his head and left arm. His face was bloody, and there was a bullet wound in his head and a corresponding perforation in the hat. This wound was

in the back of the head, and there was a wound in the lower jaw, where the bullet had passed out. There were also two bullet holes in the left breast, and one in the back. Two bullets were found in the room, one imbedded in a log and one lying upon the floor. The pockets of the clothing worn by the deceased were all turned out, excepting one, which was the left-hand pants pocket. The brother who discovered the body had last seen the deceased on Thursday evening, when the latter had called at the former's house for a horse to go to mill. The discovery of the body was in December. The weather was cold, but the door to the residence of the deceased was found open.

Some circumstances in respect to the appearance of the body and of the room will be mentioned, which will cut a figure in the investigation of the case. When the body was found, there was in the right-hand a small account book and part of a twist of tobacco. The deceased had on his shoes, but they were untied. The room had one bed in the corner; a trunk set near the bed by the wall; the key was in the lock, and the trunk had the appearance of having been opened. There was a lamp without a chimney on the end of the table, the cap of the burner was turned back, and the lamp had burned out, and there was no fire in the grate.

Shortly after the discovery of the homicide, one Dobb Moore was arrested on suspicion as the

perpetrator of the crime, and upon the examining trial was bound over to the Circuit Court. Counsel for Moore then prepared a petition for *habeas corpus*, which was presented to Judge Hicks, and the writ granted, but before the trial it was agreed by counsel for the prosecution that Moore might be discharged. It is proper to say this record discloses no fact or circumstance directly or remotely connecting Moore with the murder.

About January 1, 1894, and two or three weeks after the trial of Moore, one M. F. Edington and Sallie Margraves, a disreputable woman, were arrested, charged with this murder, but pending his examination by the Justice, and for insufficiency of evidence, the prosecution agreed that Edington might be discharged. The only incriminating evidence against Edington was his intimacy with Sallie Margraves, and his supposed guilty knowledge of the crime. Sallie Margraves was examined as a witness on the preliminary hearing of the case against Edington, and swore that she knew nothing of the murder of James Cunningham. After her examination, and when Edington had been discharged by the Magistrate, Sallie Margraves made a statement charging the defendant, Paris Clapp, with the murder, and detailing in full the circumstances attending it. Her statement led to the arrest of the defendant, Paris Clapp, who was bound over by the Justice, subsequently indicted by the grand jury, and convicted of the crime by the Circuit Court.

Sallie Margraves testified on the trial of the defendant, viz.: "I live about a mile and a half from Tazewell, and have known Paris Clapp since he was a child. I knew James Cunningham, the deceased, and lived one half of a mile from him. On November 30, 1893, about nine or ten o'clock A.M., I saw Paris Clapp at my father's. Clapp and myself made an arrangement to meet that night at the forks of the road, near my father's house, and go over to my mother's house. We met a while after dark; talked a little; it was cold; so Clapp proposed to go to James Cunningham's to get some apples. We went, and found James Cunningham sitting in front of the fire. He gave us seats, placed some kindling on the fire, and seated himself on a churn, to the right of the fireplace. We reached Cunningham's house about seven o'clock, and remained until nine o'clock. While there, Clapp asked Cunningham if he ever became lonesome, and why he did not marry. Cunningham replied that he was not able to take care of a woman. Clapp asked Cunningham if he had any water. He replied, 'Yes,' and that it was outside the door. Clapp then got up to get some, and Cunningham said: 'You had better take the lamp.' Clapp replied: 'I can find it.' Clapp went out, and then I heard the dipper rattle in the bucket. He then walked down toward the lower end of the porch, and came back to the door, with his pistol in his hand; presented it at Cunningham, and said: 'Keep

your seat; all I want is your money.' Cunningham replied, 'I have got no money,' to which Clapp replied: 'I know you have.' Cunningham said: 'I took my gold and left it at New Tazewell, in John Bin's safe, and I have loaned my greenbacks to John Davis.' Clapp then ordered him turn his pockets, and Cunningham said: 'Paris, are you going to murder me? I will give you a ten dollar bill if you will go off and let me alone.' Clapp says: 'I want it all, and I am not going to wait much longer.' Cunningham then put his hand in his left pants pocket, and pulled out a small pocketbook. Clapp says: 'You give that pocketbook to that girl [referring to Sallie], or throw it on the table.' Cunningham threw it on the table. Clapp told me to pick it up. I did so. Cunningham said: 'Sallie, give me back my notes; you wont need the notes.' Clapp said: 'Yes; give them to him,' and I did so. Clapp then told me to look in the trunk. I looked in the trunk, and found a suit of clothes, some cotton goods, and a bill book, but found no money. Clapp says: 'Put them things back good.' He then told me to turn down the bed, and 'look good for money.' I turned the bed down, but still found no money. I then placed the bed back as well as I could. Then Clapp says: 'James, do you ever pray?' I was scared, and ran out of the room. As I started out at the door, Clapp says: 'Don't leave here, or I will kill you.' After I got out at the door one shot was

fired, and I heard Cunningham say: 'Lord, have mercy on me!' I don't know whether I went off the porch or not. Then Clapp shot him twice more. Clapp then came out of the house and told me to run. I ran out of the road. Clapp says: 'If you ever tell this, I will kill you, or some of my friends will kill you.' I says: 'Clapp, ain't you ashamed to treat me this way? James Cunningham was a good neighbor boy, and a special friend of mine.' I says: 'Clapp, where do you expect to go when you die?' and he says, 'To hell, if there is such a place.' When we got on top of the ridge, near my father's, the train blew for New Tazewell, and it was due there at quarter past nine o'clock. When we got down to my mother's, Clapp stopped, took the hulls out of his pistol, and put them in his pocket. We listened, went up to the house, peeped through the cracks, and saw John Upton and Jim Carroll in my mother's house. Clapp told me not to look scared or excited, but to be cool, as if nothing had happened. We went into the house, and soon Carroll and Upton left. After they had been gone some time, Clapp said that he had lost something. He took the light, and he and I went under sister Barbary's room. Then he asked me for the money, and I gave it to him. He counted it, and said there was $118. He gave me $63 to keep, and told me not to spend any of it, but to bury it all, for it might be marked. We then came round to the door. Mother asked

him if he had found it (what he pretended to have lost). He said he had, and then went off. It was then about eleven o'clock."

The witness also stated that on the night after Edington was discharged by the Magistrate, she took the lawyers in the case and Sheriff Campbell to the woods, where she had buried the money, and dug it up. "Sheriff Campbell," she said, "scratched down by a stump, and dug up a goblet with money in it," which he now has in his possession.

Sallie Margraves also testified that the night James Cunningham was murdered was cold; that there was a good bed of coals in the fire-place; that they left the lamp burning, on the table; that the lamp had no chimney, and also that the top was turned back. She further stated that, when the deceased turned his pants pocket out, in obedience to the command of Clapp, Cunningham kept his day-book and his tobacco in his right hand. We have already stated that the lamp and the position of the body were found as described by Sallie Margraves when she left the Cunningham house.

We have thus recited the whole testimony of Sallie Margraves, for the reason that it is insisted by counsel for the prisoner that his conviction has been rested upon the evidence of this witness; that she was an accomplice in the crime, and that her testimony is uncorroborated. In this connection, it is assigned as error that the Circuit Judge failed to give a proper charge on the subject of an accom-

plice. The Court said to the jury, viz.: "An accomplice is defined to be a partner or an associate in crime, or a partner in guilt. If, in this case, you find that the witness was willingly participating or taking a part in the killing of deceased, then, in law, she was an accomplice. She would not be a participator in the killing simply by being present for some other purpose, and that without willingly participating in the killing. What the truth is as to what was her purpose and what she did, I now submit to you upon the proof. If, as a fact, you find her to have been an accomplice, then you are told that you should not convict the defendant alone upon her evidence. To warrant a conviction, her evidence must be corroborated or supported. This corroboration must be such as satisfactorily amounts to the swearing of one credible witness, either in direct evidence or from facts and circumstances. It must be such corroboration as satisfies you that she is telling the truth, not only as to the fact of the killing, but to the fact that the defendant did it."

We find no reversible error in this charge. It was certainly more favorable to the defendant than the law warranted, when the Court instructed the jury that the corroboration must be equivalent to one credible witness. Such proof would suffice and support a conviction without the testimony of the accomplice. An accomplice is defined to be a person who knowingly, voluntarily, and with common intent

with the principal offender, unites in the commission of a crime. Wharton on Evidence, Sec. 440.

The rule is, that, to sufficiently corroborate the testimony of the accomplice, there should be some fact testified to entirely independent of the accomplice's evidence, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it. The corroboration must consist in some fact or circumstance that affects the identity of the party accused. The reason is, that a person who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the person, that is really no corroboration at all. Says Mr. Wharton: "The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since, if corroboration in matters not connecting the accused with the crime were enough, a party who, in the case against him would have no hope of escape, could, by his mere oath, transfer to another the conviction hanging over himself." Wharton on Evidence, Sec. 442.

The degree of evidence which shall be deemed sufficient to corroborate the testimony of the accomplice, is for the determination of the jury. The law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime, so that his conviction will not

rest entirely upon the evidence of the accomplice. *People* v. *Everhardt*, 104 New York, 591; *Com.* v. *Holmes*, 34 Am. Rep., 391; *People* v. *O'Neal*, 109 New York, 267; 3 Rice on Evidence, Sec. 324." To the same effect are our own authorities: *Robinson* v. *The State*, 16 Lea, 146; *Hall* v. *State*, 3 Lea, 564.

What, then, are the facts and circumstances relied on by the State, independent altogether of the evidence of the accomplice, which, taken by themselves, tend to connect the defendant with the commission of the crime?

Barbara Margraves, a sister to Sallie, corroborates the statement of Sallie, that when she and Clapp returned that night they procured a lamp and went under the house and divided the money. Barbara states that she had retired for the night; that a light under her floor attracted her attention; that she slipped out of bed, got on her knees, and looked through a crack in the floor; that she saw Paris Clapp and Sallie Margraves under the floor; that Paris had some paper money, and that it looked to be "right smart."

This woman's character was attacked, as was also that of Sallie Margraves, for lewdness, but the character of both for truth was sustained by a number of reputable witnesses. J. C. Campbell, the Sheriff of the County, examined the premises of Eliza Margraves, and sustained Barbara's statement that there was a crack in the floor through which objects below could be distinctly seen.

Another fact disclosed in the proof is that shortly

before the murder the prisoner, who was working on a farm at wages of ten dollars per month, had no money, and was attempting to borrow money to purchase a suit of clothes. After the murder he displayed money to several persons, and seemed to be supplied. He paid some bills and presented a five-dollar gold piece to Nell Essary as a birthday present. The defendant also exhibited a five-dollar gold piece at a shooting match for some turkeys.

J. C. Carr says Clapp commenced to work for him October 24 at ten dollars per month. "Before Cunningham's death, Paris asked me often for money to buy a suit of clothes; after Cunningham's death he said he had the money to buy the clothes, but not to let his folks know it. Clapp was always a working boy—good hand—never idling about. Said he wanted to pay me for his father's coffin, which I had furnished."

H. T. Campbell, a merchant at Cumberland Gap, testified that, about December 6, 1893, he sold Paris Clapp a suit of clothes for ten dollars; underwear, three dollars and sixty cents.

W. A. Johnson, a merchant of Tazewell, stated about December 1 Paris paid him his store account; that Clapp handed him a ten-dollar bill and he gave him back the change; that he left a large pistol in witness' store. Clapp's pistol was found to be a 44-caliber, and a ball of that size was found in Cunningham's house.

Millard Meyers changed five dollars for Paris ten days after Cunningham was killed.

Another fact tending to fix guilty knowledge upon the defendant is found in the testimony of John Upton. This witness testifies that, one night during the week preceding the discovery of the body on Sunday, he and James Carroll were at the house of Eliza Margraves; that Paris Clapp and Sallie Margraves came to the house together between nine and ten o'clock; that Paris and James Carroll talked at the door secretly, and witness heard one of them say, "Into hell he hops!" Again, it appears that while Sallie Margraves was in jail, charged with this offense, she was permitted to visit the house one night under the charge of an officer, one James McMahan; that while there Paris Clapp came in, and, with the permission of the officer, stepped outside the door with Sallie; that the officer went to the door, and heard the defendant say, "Die with it in you, or die before you tell it!" The witness says that he may possibly be mistaken as to the language used by the defendant, but this is his best impression. Moreover, it appears that while the woman, Sallie Margraves, was in jail, the defendant visited her, and was also seen whispering to her while she was in the witness room. The woman testifies that on these several occasions he was threatening to kill her in case she should reveal the secret.

The jury discredited the testimony by which the

accused sought to establish the defense of an *alibi*, and, upon the facts and circumstances disclosed in the proof adjudged him guilty.

It is a much controverted fact in argument whether Sallie Margraves was in fact an accomplice in the commission of the crime. It is insisted by the Attorney-general that she was not an accomplice, but was present at the scene of the killing for a lawful purpose, and while there became the unwilling tool of the defendant in the execution of his plans of robbery; that she was terrorized by the drawing of the weapon, and her knowledge of the desperate character of the defendant, as well as by his threats then and afterwards, that he would kill her if she disobeyed him or should ever reveal the secret.

Without expressing an opinion in respect to the guilt of the defendant, as the case must be retried, we proceed to notice the other assignments of error.

It appears from the record that a reward was offered for the arrest and conviction of the assassin of James Cunningham. The defendant was arrested by one J. C. Campbell, the Sheriff of Claiborne County, who testifies that he expected to receive one-third of the reward, it not being shown who was to receive the remaining two-thirds. At any rate, the said Campbell swore out the warrant and was the prosecutor in the Justice's Court. In the Circuit Court, while not the prosecutor, the Sheriff was very active in getting up the testimony and in managing the case. Two days before the case was called

the defendant made affidavit of the interest and feeling of the Sheriff in the prosecution, and moved the Court to appoint an officer to summon the jury. The Court thereupon made an order adjudging that the Sheriff was disqualified and incompetent to summon the jury, and appointed one J. T. Longmore a Deputy Sheriff for that purpose. Now, the error assigned is that, after the appointment of this special Sheriff on account of the disqualification of the regular Sheriff, the latter, the said J. C. Campbell, gave to the special Sheriff thus apppointed the names of three of the disqualified Sheriff's regular deputies, to assist in summoning the jury. This action of the disqualified Sheriff was not known to the defendant until after he had been tried. The defendant complains that the jury that tried him were summoned in part by deputies suggested by the regular Sheriff, and that, under the order of the Court, he was entitled to a jury whose selection was not directly or indirectly made by the disqualified Sheriff. The special Sheriff made affidavit that no juror was summoned by his deputies whose names were furnished by the Sheriff, but there is no affidavit from the deputies whose names were suggested by the regular Sheriff, that they were not influenced in the selection of the jurors by the regular Sheriff.

In this connection, it is proper to notice another assignment in respect to the misconduct of the Sheriff. It appears that the jury, during the progress of the trial, were boarded at the house of the said

Campbell. The disqualified Sheriff and several jurors make affidavit that, while there, this Sheriff passed through the room two or three times. The Sheriff makes affidavit that he did not communicate with any of the jurors while in the room, and several of the jurors sustain him in this statement. The defendant, by counsel, complains that he has no guaranty that his trial was fair, when the jury is shown to have been summoned by deputies suggested by his former prosecutor, and then taken to board at his house, where they were accessible to communication by word or sign and every species of subtle influence.

Again, it is assigned as error that the Attorney-general was permitted, over the defendant's objection, to ask defendant, on cross-examination, if he had not killed a man in West Virginia, and if he had not killed two men in West Virginia. The defendant declined to answer whether he had killed one man in West Virginia, but did say that he had never killed two men in West Virginia.

The Court should have sustained the defendant's objection. It is true that, when a defendant in a criminal case takes the stand in his own behalf, he waives his right to protection against compulsory inculpation, and a refusal to answer any question pertinent to that investigation is ground for adverse inference. Greenl. on Evidence, Vol. I., p. 600, note g, and cases cited.

But this right of cross-examination and compul-

sory incrimination of the defendant does not extend to collateral and independent crimes, having no direct or remote connection with the case on trial. In respect to such matters, the defendant has a right to claim his privilege from self-incrimination, and if the fact about which he is interrogated forms but one link in the chain of testimony which might convict him of such independent crime, he is protected. The tendency of the question in respect to the killing of a man in West Virginia was to criminate the defendant or to expose him to a criminal prosecution, and, the inquiry being wholly apart from the present investigation, the defendant was privileged from answering. The Court was, therefore, in error in overruling the defendant's objection.

We are constrained to believe that, on account of the errors and irregularities disclosed in the record, the prisoner has not enjoyed the benefit of a fair and impartial trial guaranteed him by the Constitution and laws of the State. In the selection of the jury we can see it was in the power of the disqualified Sheriff, through the instrumentality of the deputies suggested by him to the special Sheriff, to have filled the jury box with persons inimical to the accused, or who at least would have been dominated in their deliberations by the influence of the Sheriff, who was so largely interested in the conviction of the prisoner. It is not necessary that it should affirmatively appear that the action was preju-

dicial, it is sufficient that such misconduct might have prejudiced the rights of the prisoner.

In addition to this, it was a gross irregularity that the jury, while this case was pending, should have been boarded at the house of the Sheriff, and that the latter should have been permitted to pass through their room two or three times.

It results that, for these reasons, the judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1894.

BALLARD *v.* RAILROAD.

(*Nashville.* January 5, 1895.)

1. CHANCERY COURT. *Will not grant new trial, when.*

Chancery Court will not grant a new trial upon an averment that complainant was deprived of his remedy by appeal by reason of the refusal or failure of the trial Judge and opposing counsel to carry out an agreement to complete bill of exceptions and perfect appeal after the close of the term at which the case was tried. Such agreements are contrary to public policy. (*Post, pp. 207–210.*)

2. SAME. *Same.*

Chancery Court will not grant a new trial unless complainant shows affirmatively that his rights were lost in the former pro-

ceeding by fraud or accident, unmixed with any fault or negligence of himself or attorney. (*Post, pp. 206, 207.*)

Cases cited and approved: Kearney *v.* Smith, 3 Yer., 127; 7 Cranch, 332.

FROM SMITH.

Appeal from Chancery Court of Smith County. B. M. WEBB, Ch.

T. J. FISHER and S. F. WILSON for Ballard.

TURNER & SMITH, HALE & LEE for Railroad.

WILKES, J. The case presented by the record, so far as need be stated, is that it is a bill in chancery, seeking to obtain a new trial of a cause already tried in a law Court on its merits, and appealed to the Supreme Court, and there dismissed, because the appeal was not perfected in the time allowed by law and the practice in such cases.

The Chancellor, on demurrer, dismissed the bill, and complainants have appealed and assigned as error the action of the Chancellor in not rehearing the case upon its merits.

The jurisdiction and power of the Chancery Court to grant new trials, as well as to relieve from judgments at law when a proper case is made out, is well established. The rule is laid down by Chief Justice Marshall in 7 Cranch, 332, as follows:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or agent, will justify relief by a Court of Chancery, if the equity of the applicant is free from doubt."

This rule has been approved and followed in Tennessee in a multitude of cases. See cases cited 1 King's Digest, Sec. 737; *Kearney & Moone* v. *Smith & Jackson*, 3 Yerg., 127.

The case as presented in the present record, is that the trial Judge, by consent of the attorneys of both parties in the action at law, agreed to write out his charge after the close of the term at which the cause was tried, and to perfect the bill of exceptions by a certain day, which was to be set for an adjourned term, but failed to do so, and delayed it, over the appellant's protest, for more than a year; that the attorneys of appellee agreed that the delay should not vitiate the appeal, but that the record might be so made up as to show that the bill of exceptions was completed and appeal perfected during the term, so as to appear regular upon its face; that appellant did not know that the agreement and perfecting of the record had not been consummated until the case was called for trial in the Supreme Court, when the record did not appear, as it had been agreed it should, but showed the bill of exceptions filed and appeal perfected after

the time allowed by law, when, on motion of appellee, the cause was dismissed because of such failure to perfect the record in the time prescribed by law, as shown by the record. While the appellee states in his bill that he did not know, until the case was called in this Court that the record was not made up as agreed upon, he does not allege that he might not have ascertained this fact by an examination of the transcript, nor does it appear that, by proper attention to the entries made, they might not have been made to conform to the agreement as entered into.

If, therefore, we could regard such an agreement as legal and valid, appellant has not shown that diligence, unmixed with negligence, that moves a Court to grant a new trial of a cause already tried upon its merits. But neither this Court nor the Court of Chancery can grant relief upon any agreement of the trial Judge and attorneys in the Court below to delay the completion of bills of exception and the perfecting of appeals beyond the term at which the case is tried, nor can any relief be predicated upon the failure or refusal of the Court or opposing counsel to carry out such agreement, even if made. A practice permitting bills of exception to be made out and appeals perfected after the trial term would be against public policy, and would inevitably result in differences between opposing counsel and the trial Judge, and between the counsel themselves, as to what the evidence and charge of the trial Judge

really was, and would be detrimental to the proper dispatch and conduct of business in the Courts.

This Court cannot encourage, or, indeed, recognize, the practice of making up bills of exception after the adjournment of the trial term. If a trial Judge fails or refuses to write out his charge, or to sanction it as written, the remedy is given to compel him to do so by mandamus. It is said the terms of the trial Court press so closely upon each other that it is impracticable to perfect the records during the sitting of the Court. If this is so, it is a matter which addresses itself to the Legislature, and not to this Court.

A new trial in equity cannot be granted upon the facts stated in the bill, and the decree of the Court below is affirmed, with costs.

*ELLIS *v.* REAVES.

(*Nashville.* January 5, 1895.)

MORTGAGES AND DEEDS OF TRUST. *Cover foal of mortgaged mare.*

The title of the foal of a mare bred, after the execution of the deed, by the maker of a mortgage or deed of trust conveying the legal title of such mare, passes to the mortgagee or trustee, in the absence of an agreement to the contrary.

Cases cited: Bank *v.* Ewing, 12 Lea, 600; Latta *v.* Fowlkes, *post*, p. 219; 8 Gill & Johnson, 39; 11 How., 396; 9 B. Mon., 126; 67 Md., 573; 85 Ala., 417; 88 Ala., 225; 69 Ia., 504 (S. C., 58 Am. R., 230); 60 N. H., 59 (S. C., 49 Am. R., 306); 64 Wis., 35 (S. C., 54 Am. R., 578); 46 Mich., 131 (S. C., 41 Am. R., 153); 13 Neb., 400.

FROM TROUSDALE.

Appeal from Circuit Court of Trousdale County. W. T. SMITH, J.

JOHN S. MCMURRY and J. J. TURNER for Ellis.

S. F. WILSON, W. C. DISMUKES, and W. B. HALE, for Reaves.

CALDWELL, J. This is an action of replevin, brought by H. C. Ellis, trustee, before a Justice of the Peace, to recover from A. S. Reaves the

*The authorities as to the title to increase of animals are collected in a note to the Kentucky case of *Maize* v. *Bowman*, 17 L. R. A., 81.—REPORTER.

possession of several horses and one mule. Pending an appeal, by Reaves, from the Magistrate's judgment, all of the stock, except the mule, were eliminated from the case by agreement. The controversy as to the mule was submitted to the Circuit Judge, without a jury, and he pronounced judgment in favor of the defendant. The plaintiff appealed in error.

On May 11, 1891, the defendant, Reaves, executed a deed of trust, whereby he conveyed to the plaintiff, Ellis, as trustee, certain live stock, and other personal property, to secure the payment of certain debts to the Bank of Hartsville. By the terms of the trust, it matured April 1, 1892; but, at the request of the maker, foreclosure was postponed for several months, and some of the horses conveyed (being the same originally involved in this suit) were not sold until after their recovery herein before the Justice of the Peace. When all of the property specifically named in the conveyance had been sold, and the proceeds properly applied by the trustee, there remained unpaid about $1,200 of the secured debts. The deed contained no provision with respect to the possession or increase of the property while the trust should continue, and there was no agreement between the parties concerned as to either. Reaves, the maker, however, retained the possession of all the property until it was needed by the trustee for sale, and of some of the horses until this action was brought to recover them.

Among the live stock conveyed was a roan mare,

which Reaves, of his own motion, and without consultation with the trustee, bred to a jack soon after the deed of trust was executed. About the time the trust matured, the mare foaled a mule colt, which is the animal now in controversy in this case. The dam and foal ran together until weaning time, both in the possession of Reaves, and the mule was retained by Reaves until June, 1893, when this suit was commenced by the trustee for its recovery. Upon these facts, is the mule the absolute property of Reaves, as ruled by the Circuit Judge, or does it belong to Ellis, as trustee?

Perhaps no rule of property is more general or just than that the offspring of a domestic animal belongs to the owner of the dam or mother. 2 Bl. Com., 390; 3 Lawson on Rights, Rem., & Pr., Sec. 1370; *Tyson* v. *Simpson*, 2 Haywood (N. C.), 147.

The ownership of mortgaged property or of property conveyed in trust, is divided. Neither the mortgagor nor the mortgagee, the maker nor the trustee, is the full and complete owner; each has an interest. In this State the legal title to such property passes at once to the mortgagee or trustee, and he becomes entitled to immediate possession, unless otherwise provided in the deed. *Bank* v. *Ewing*, 12 Lea, 600.

The conveyee, in such a case, takes the property, in all of its parts and elements, so far as required for the purposes of the conveyance, while the con-

veyor, if the property be personalty, is left only the right to reclaim it by payment of the secured debts before foreclosure, or to receive the residue, if any, after foreclosure; and, if the property be realty, he has the additional right of redemption after foreclosure, unless that right is cut off by the terms of the conveyance. So long as the secured debts remain unpaid, in whole or in part, the title of the conveyee is paramount, and that of the conveyor is subordinate. As against the debts, the conveyor can assert no right or title.

Such, unquestionably, were the respective interests of Ellis and Reaves in the roan mare, whose foal is the subject matter of this litigation; and that such are their respective interests in the foal itself follows, logically, from the principle that the offspring of a domestic animal belongs to the owner of the dam or mother.

Thus, by the application of plain principles, the controversy is resolved in favor of Ellis, the trustee.

It matters not that the mare was bred by the maker after the execution of the deed of trust; for, in such case, as well as if she had been previously bred, the title of the foal would follow the title of the dam without variation, in the absence of some provision or agreement to the contrary. Since the whole legal title and right to immediate possession of the mare, with all of her powers and elements of value—her brood bearing capacity with the rest—passed to the trustee, without qualification or res-

ervation, the legal *status* of the offspring would be the same in either case. The title of the foal is separable from that of the dam only by some provision, agreement, or contract, made for the purpose of disuniting them. If Reaves incurred liability for the season of the mare, the fee might be a prior charge, under the statute, upon the foal; but that would be equally true if the service had occurred before the deed of trust was made. *Sims* v. *Bradford*, 12 Lea, 434.

The text-writers, with great unanimity, support our view upon the main question.

Jones says: "Under the rule that the incident follows the principal, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase; and it is not incumbent upon the mortgagee to take and hold the property as against a purchaser of such increase." Jones on Chat. Mort. (4th Ed.), Sec. 149.

Cobbey says: "The general rule of law is that the offspring or increase of female animals, when they come into visible existence, and are endowed with independent life, vest under the same title or ownership their dam was subject to at the time they were brought forth. * * * The offspring of mortgaged animals which are born after the making of the mortgage, are subject to the lien of such incumbrance. * * * Under the rule that the incident follows the principal, a mortgage

of a female animal covers her increase." Cobbey on Chat. Mort., Sec. 366.

Boone says: "A mortgage of chattels covers accession thereto. * * * So, it has been held that the young of animals under mortgage are subject to the mortgage." Boone on Mort., Sec. 244.

Other authors announce the same doctrine in similar phraseology. "A mortgage of a domestic animal will cover its increase." 3 Lawson on Rights, Rem., & Pr., Sec. 1370. "Where live stock is mortgaged, its natural increase and produce become subject to the mortgage." 2 Hilliard on Mort., 205. "Where live stock is mortgaged, the natural increase and produce of the stock also become subject to the mortgage." 3 Am. & Eng. Enc. Law, 186. "And, on the same principle, it is held that a mortgage of domestic animals covers their increase." Tiedeman on Sales, Sec. 231.

The foregoing quotations from text-writers are abundantly sustained by the adjudged cases. During the period of negro slavery in this country, the principle that the title of the offspring follows the title of the mother was generally, if not universally, applied in cases where children were born to female slaves while under mortgage. *Hughes* v. *Graves*, 1 Littell, 317; *Evans et al.* v. *Meniken*, 8 Gill & Johnson, 39; *Fowler* v. *Merrill*, 11 How., 396.

The same principle has been either applied, or recognized as applicable, to the increase of mortgaged domestic animals, in each of the following cases:

Forman v. *Proctor*, 9 B. Mon., 126; *Cohoon* v. *Miers*, 67 Md., 573; *Meyer Bros.* v. *Cook*, 85 Ala., 417; *Dyer* v. *The State*, 88 Ala., 225; *Rogers* v. *Highland*, 69 Iowa, 504 (S. C., 58 Am. R., 230); *Darling* v. *Wilson*, 60 N. H., 59 (S. C., 49 Am. R., 306); *Funk* v. *Paul*, 64 Wis., 35 (S. C., 54 Am. R., 578); *Kellogg* v. *Lonely*, 46 Mich., 131 (S. C., 41 Am. R., 153). *Boggs* v. *Starkey*, 13 Neb., 400, seems to be in conflict; but we have found no other case that is so.

It was decided in the two cases cited from New Hampshire and Wisconsin, and indicated in those cited from Iowa and Michigan, that the title of the mortgagee to the offspring of mortgaged animals, though at all times superior to that of the mortgagor, would not prevail against one in the position of an innocent purchaser from the mortgagor in possession during the period of nurture only. Jones and Cobbey take the same view. Jones on Chat. Mort., Sec. 149; Cobbey on Chat. Mort., Sec. 368. A contrary opinion was expressed in the 85 Alabama case cited above.

That question, however, does not arise in this case, the controversy here being wholly between the maker of the deed of trust and the trustee.

None of the cases cited make any distinction between the case in which the animal was bred before the execution of the mortgage and that in which it was bred subsequently. In most of them, it is true, the females were, in fact, pregnant at the

time the mortgage was made; but in none of them do the Courts attach any importance to that circumstance. On the contrary, the decision in each of those cases was based upon the legal proposition that the title of the offspring follows the title of the dam or mother—*partus sequitur ventrem.*

The only case we have been able to find in which the time of conception has been treated as of any moment in determining the ownership of young animals born of mortgaged females, is that of *Thrope Bros.* v. *Cowles*, 55 Iowa, 409. There the trial Judge instructed the jury that the mortgagee was not entitled to young animals so born, unless he should prove one of two facts: First, that they were conceived prior to the date of the mortgage; or, second, that, after that date, the mortgagee had open possession and control of the mortgaged females and their increase. The Supreme Court said: "No exception was taken, or objection is made, by either party to this instruction. It must be regarded as presenting the law of this case." Whether it would have been so "regarded" if challenged does not appear. No reason is given nor authority cited in its support. Cobbey incorporates the substance of that instruction into his text as an independent proposition, and cites that case, but none other, to support it. Cobbey on Chat. Mort., Sec. 367.

Not only does that case stand alone, but it seems to us to be without any sound reason to sustain it.

Moreover, the controversy there was between the mortgagees and attaching creditors of the mortgagor, and not between the mortgagees and mortgagor. Had the controversy been between the original parties, as in the present case, the Court would, no doubt, have ruled differently.

Besides the numerous authorities already cited in support of our conclusion in this case, it is fully sustained by the unreported case of *Latta* v. *Fowlkes*, decided by this Court, at Jackson, in April, 1883. In that case H. B. Fowlkes conveyed a brood mare and other property to S. R. Latta, trustee, to secure certain debts. The maker of the deed remained in possession of the mare for some time, and she gave birth to a colt. Supposing the colt to belong to him, he conveyed it, by another deed of trust, for the benefit of other creditors, who had no knowledge that it was the foal of the mare conveyed to Latta. Those other creditors sold the colt to Arthur Fowlkes, who knew of the deed to Latta and of the fact that it was the foal of the mare therein conveyed.

Latta did not know that the mare conveyed to him had dropped a colt until it was about four years old. Soon after obtaining that information, he sued in replevin to recover it from Arthur Fowlkes, the purchaser. This Court held that "the foal followed the condition of the dam," and that "the trust attached to it." The mare was in foal

at the time she was conveyed to Latta, but that fact cut no figure in the decision of the case.

Reverse, and enter judgment in favor of Ellis, trustee.

OPINION IN LATTA *v.* FOWLKES, REFERRED TO IN THE ABOVE OPINION OF THE COURT.

DEADERICK, Ch. J. On a former day of this term the judgment in this case was reversed from the bench, and defendant has presented a petition to rehear.

The record shows that in January, 1876, one H. B. Fowlkes conveyed in trust to plaintiff, to secure certain debts, amongst other things a certain mare then in foal; that the property conveyed in trust remained in possession of the maker of the deed, it having been registered immediately after its execution.

On June 29, 1877, said H. B. Fowlkes executed a deed of trust upon the produce of the mare conveyed to Latta, and on other property, to secure Benton & Nichols certain indebtedness due to them, they not knowing that the colt was the foal of the mare conveyed in trust to Latta. After the deed to secure Benton & Nichols, the possession of the property remained undisturbed with said H. B. Fowlkes, he supposing that the increase belonged to him, and that he could convey to Benton & Nichols. This deed was registered at the date of its execution.

On October —, 1878, Benton & Nichols sold this colt and three others to defendant, Arthur Fowlkes, and his brother, and they gave their notes in payment, and also gave a deed of trust on the colts to secure them. They have paid half the purchase money, and owe the balance. In the division of the colts, the one in controversy fell to defendant, Arthur, and he took possession of him, claiming him as his own. He knew of the deed to Latta, and that the colt he claims was the foal of the mare conveyed in the trust deed to Latta. Latta did not know that the mare conveyed to him had had a colt until a short time before he began this action, in which he replevied the colt from defendant, it still remaining with H. B. Fowlkes, who was holding it for his brother, the defendant. Latta had no notice of any adverse claim to any of the property conveyed to him, or to its increase, until shortly before he began his suit.

This cause was submitted to the Judge without a jury, and he found that the defendant was entitled to the colt, which, by the time the suit was begun, was four years old, and gave judgment for his value, to be satisfied by his return, and plaintiff appealed to this Court.

Upon these facts, it appears that the possession of the said H. B. Fowlkes of the dam of the colt was retained by him in subordination to the right conveyed in said deed, and that, although not so expressly declared in the deed, the foal followed the

condition of the dam and the trust attached to it; and no adverse claim was ever set up by H. B. Fowlkes to the dam, which was left in his possession by consent of the trustee, but subject to his legal rights under the deed, and no claim was ever made to said trustee of right to said foal adverse to him, until shortly before he replevied the same.

The conveyance of the said colt in trust to secure another debt, is not necessarily an adverse claim, as it might well be done in subordination to the original trust deed. The possession still remained with H. B. Fowlkes, the original bailee, who was holding for the trustee, and no notice of adverse holding was given to him. Even if H. B. Fowlkes did think the colt belonged to him, he admitted the trustee's right to the dam, and did not communicate to the trustee that he held the colt adversely.

The said Benton & Nichols were not innocent purchasers, nor was defendant, who purchased from or under their claim. The deed to Latta was registered, and was constructive notice to all, and defendant also had actual notice of its provisions, and that the colt was the foal of a mare conveyed in that deed. Besides, Benton & Nichols were not purchasers, and had but a lien to secure a pre-existing debt, the possession of the colt remaining in H. B. Fowlkes.

The petition to rehear will be dismissed, and judgment below will be reversed, and judgment will be rendered here for plaintiff.

* LANCASTER *v.* FISHER.

(*Nashville.* January 5, 1895.)

SUPREME COURT PRACTICE. *Motion for new trial not required, when.*

Although no motion for new trial was made in the Court below, this Court will, under proper assignments of error, pass upon the sufficiency of the facts to support the judgment in a law case tried by the Judge without the intervention of a jury. *Aliter* in cases tried by jury.

Cases cited and distinguished: Wells *v.* Mosely, 4 Cold., 402; Mumford *v.* Railroad, 2 Lea, 394; Morgan *v.* Bank, 13 Lea, 234; Insurance Co. *v.* Crunk, 91 Tenn., 376.

FROM SMITH.

Appeal from Circuit Court of Smith County. W. T. SMITH, J.

TURNER & SMITH for Lancaster.

T. J. FISHER for Fisher.

BEARD, J. This cause was tried by the Circuit Judge without the aid of a jury. It is unnecessary to state the facts, as the record presents but one question of any interest, and that is one of correct

* The Court reserves the question whether motion for new trial would be required in a case like this one, if such motion was required to be made in all cases by the rules of the lower Court.—REPORTER.

practice in the Court below. There was no motion for a new trial made in that Court, and the defendant in error (the plaintiff below) now insists that, in any event, the action of the trial Judge would be conclusive, from the failure of the plaintiff in error to make this motion in the Circuit Court and to have it there acted upon. In other words, the position assumed is, that this Court, on appeal, applies the same rule in cases submitted to the trial Judge without the intervention of a jury, as in those which are tried by a jury, and that, in all alike, to put the Circuit Judge in error, there must have been a motion for a new trial, and the record must show that this motion was overruled. As the argument of the counsel in this case, as well as suggestions made by counsel in other cases, indicate some misapprehension on this subject, we deem it best to announce here distinctly what is the rule in this State.

It is assumed by the defendant in error that the cases found in 4 Cold., 405; 2 Lea, 397; 13 Lea, 239, and 7 Pickle, 376, sustain his position. This being so, it becomes necessary briefly to examine them.

Wells v. *Mosely*, 4 Cold., 402, was a jury case. In that case, there was no motion for a new trial, but, on appeal, this Court reversed and remanded it, for errors of law committed by the Court below, which were apparent on the face of the record, and which affected the merits of the controversy. In

course of the argument made against the insistence of the defendant in error, that, in the absence of such a motion, there could be no reversal for any cause, this Court makes the proper and evident distinction between a case where errors of law apparent are complained of, and a case in which the action of the jury on the facts is the ground of objection, and says in this latter case: "This Court cannot reverse the judgment and grant a new trial, unless the Court below had been asked to correct the error and had refused to do so. And in such case, the refusal of the Court to set aside the verdict and grant the new trial, is the error for which this Court will reverse." The authority of this case, so far as the rule in question is concerned, is, by its express terms, as well as upon well settled principles, to be confined to cases in which jury trials have taken place. There is nothing in the opinion to indicate that it was the purpose of the Court to give it wider scope.

Memphis v. *Railroad*, reported in 2 Lea, 394, was tried by the Circuit Judge, sitting without a jury. In the course of the opinion of this Court, it is said in passing: "No motion having been made in the Court below for a new trial, if there had been a jury, there could be no error assigned upon the facts, and we take it the same rule must be held to apply when a jury is waived, and the Judge acts both as Judge and jury." Whether the point had been presented in argument of counsel, or

whether it was a suggestion of the learned Judge, made of his own motion, does not appear. However made, it evidently had received no serious consideration, and a judgment upon it was in no way essential to the determination of the case. Without regard to what would be the proper rule in a non-jury case where the error complained of was one of fact, in the case then being considered the Court found apparent, on the face of the record, errors of law, and for these alone it reversed the judgment of the Court below. The expression above quoted, and which defendant in error relies on in support of his position, being unnecessary to the decision of the case, was a mere dictum, and of no binding authority.

In *Morgan* v. *Bank*, 13 Lea, 234, there is found once more a dictum on this subject. In that case, it seems to have been argued by the defendant in error, as in the case at bar, that there could be no review of the action of the trial Judge trying the case without a jury, because there had been no motion for a new trial in the Circuit Court; and, to this contention, this Court, speaking through Judge Deaderick, says: "As to this last proposition, it is correct; but, as we understand the case, the errors complained of are errors of law; and, if errors of law apparent from the record, they might be corrected although no new trial was asked;" and the Court thereupon proceeds to reverse the judgment of the Court below

for errors of law committed in the trial of the cause.

The last case relied on by the defendant in error is *Insurance Co.* v. *Crunk*, 7 Pickle, 376. That, however, was a jury case. In that, the record showed a motion for a new trial and in arrest of judgment, and it was insisted that, inasmuch as a motion in arrest overruled a motion for a new trial, it was as if the latter motion had not been made, and therefore the errors assigned could not be considered on appeal. But this was held to be immaterial, and the Court then restated, in more succinct form, the rule as originally announced in this State in *Wells* v. *Mosely*, *supra*, and proceeded to dispose of the case upon the errors of law assigned.

Thus, it will be seen that the cases which are relied upon by defendant in error do not support his contention, save only as such support may be found in the dicta of the two non-jury cases. In passing, it may be proper to state that these dicta were not embraced in the syllabus of either one of these cases, nor in the index, nor have they been carried forward into our digests, so far as we can discover. Upon the other hand, the practice has been uniform with the present Court and its immediate predecessors at least, to dispose of all cases appealed from the judgments of the Circuit Judges, rendered without the aid of juries, upon assignments of error, both of law and fact, whether motions for new trials were made in the Court below or not.

That this is a proper practice, a little consideration will make clear. In a trial by jury, the Judge, as the presiding officer of the Court, exercises a supervisory power over the pending proceedings. He passes on the questions of the competency or incompetency of the offered testimony; he confines this testimony to the issues involved, and finally gives in charge to the jury what he understands to be the law of the case. The whole trial passes under his trained and watchful observation. He sees the demeanor of both witnesses and the jury, and his experience makes him especially capable of determining the value of the testimony of the one, and whether the verdict of the other has been to any extent influenced by prejudice or any other improper or corrupt motive, or is the result of ignorance or inconsiderateness.

In addition, as was said by Lord Mansfield in *Bright* v. *Eynan*, 1 Burr., 394, "most general verdicts include legal consequences as well as propositions of fact, and in drawing these consequences the jury may mistake and infer directly contrary to law, and no one is in so good a position to discover this mistake as the Judge presiding at the trial."

It is therefore altogether proper that, in all cases where it is insisted the right has not been reached by the jury's verdict, the Judge conducting the trial should first be given an opportunity to determine whether justice demands another trial before a differ-

ent jury, and that, failing to ask this opportunity, the appealing party will not be heard to complain of errors of fact in this Court. But it is otherwise where the trial occurs before the Judge sitting without a jury. He is no longer a mere supervisor so far as the facts are concerned, but he is the judge of the law and the facts. It is to be assumed that he conducts the trial of the cause intelligently, honestly, and deliberately. The judgment, when rendered, is his on all the issues presented in the case, and it will be presumed that it embodies his best conclusions on these issues. This being so, it would be an idle ceremony for this Court to require, as a prerequisite to an appeal from such a judgment, that the trial Judge should first be called on, through motion for new trial, to correct it. Whether this would be so where the record disclosed the fact that the Circuit Judge had adopted as one of the rules of his Court that motions for new trial should be made in all cases, and that in the case presented no such motion was made, we do not now determine.

That, however, is not this case, as the record gives no intimation of the existence of such a rule of practice in the lower Court. We therefore have considered the errors of fact as well as of law assigned, notwithstanding the absence of a motion for new trial, and now affirm the judgment of the Circuit Judge.

BALLARD *v.* DIBRELL.

(*Nashville.* January 8, 1895.)

EXECUTION. *Debtor's waiver of objection to sufficiency of levy.*

An execution debtor, who assents to a levy on his property as it is made, gives the officer a description of the property levied upon, and executes a statutory bond for its delivery, waives the objection that the property was not in sight when the levy was made.

FROM WHITE.

Appeal from Chancery Court of White County. B. M. WEBB, Ch.

ADCOCK & ROBINSON for Ballard.

M. A. CUMMINGS for Dibrell.

BEARD, J. Defendant Dibrell, as Deputy Sheriff, had, for collection, two common law executions issued against the complainant, Ballard, and others. With these executions in his possession, the officer visited the home of complainant in order to levy the same on the latter's property. On this visit the complainant gave the officer a levy on certain personal property belonging to him, and soon thereafter executed a statutory bond for the delivery of the prop-

erty to the officer at a time and place agreed upon between the parties. Before the maturity of this bond, complainant, Ballard, filed a bill to impeach the levy and set aside and cancel the delivery bond, first, because the levy was void for vagueness of description, and, second, for the reason that the personal property levied on was not present nor accessible to the officer, nor in any way subject to the dominion of the officer, at the time of the levy.

Issues were made by proper pleading, and proof somewhat conflicting was taken. On the trial the Chancellor dismissed complainant's bill and the cause is now here by appeal, and errors are assigned upon this decree: (1) As to description of the property levied on, appellant points out no vagueness or obscurity in it, and we can find nothing to warrant this contention. (2) Conceding the fact to be as Ballard insists, that the property was not in sight when the levy was made, it was, under the facts of this case, a good levy as to him, whatever it may have been as to others. He assented to the levy as it was made, gave the officer a description of the property levied upon, and then executed a statutory bond for its delivery at a time and place agreed upon between complainant and the officer. These acts amount to a conclusive agreement on his part with the officer, that the levy is good. If there was any irregularity on the part of the officer, he waives it.

Mr. Freeman, in his work on Executions, Art. II., Sec. 260, states the law as follows: "When an

officer goes to the defendant's property or to the defendant for the purpose of making a levy, and the defendant furnishes a list of property to be taken in execution, or by any other act assents to the levy, or shows an intention to regard the levy as consummated, he seems to be thereafter estopped from alleging there was some omission or informality in the levy. * * * If the defendant, knowing of the levy which the officer is making, submits to it, there can be no further question between him and the officer about the sufficiency of the levy, for his conduct has waived all further proceedings, and this he is competent to do. * * * If he has submitted to the levy, it is immaterial, as far as he is concerned, whether the property was ever within the view or control of the officer."

This statement of the law is sustained by reason and authority. We therefore affirm the decree of the Chancellor, with costs.

LOFTIS *v.* LOFTIS.

(*Nashville.* January 10, 1895.)

1. GUARDIAN AD LITEM. *Has right of appeal.*

The guardian *ad litem*, and next friend, of a minor has a right to appeal "whenever, in his opinion, it is necessary to protect the minor's interests." (*Post, p. 237.*)

2. APPEAL. *Brings up entire case, when.*

The administrator's broad appeal from a decree settling the rights of the parties and ordering sale of realty in a chancery cause brought by him to administer and settle up an insolvent estate, brings up for review that part of the decree denying homestead to the infant defendants, without appeal by them. (*Post, p. 237.*)

3. RESULTING TRUST. *Not established, when.*

An oral agreement by the purchaser of land for a lien or charge thereon in favor of his wife for a part of the purchase price furnished by her, until repayment of the amount with interest, creates no resulting trust in her favor as against her husband's creditors. (*Post, pp. 237–239.*)

4. INSOLVENT ESTATE. *Year's support not paid out of proceeds of realty.*

An amount set apart by the County Court, to be paid in money as year's support for the widow, cannot be proved as a debt against the husband's estate, to be paid out of the proceeds of the realty, even where there are no personal assets to pay it and the estate is insolvent. (*Post, pp. 239, 240.*)

Code construed: §§ 3125, 3126 (M. & V.); §§ 2285, 2286 (T. & S.).

Cases cited and approved: Rice *v.* Hunt, 7 Lea, 33; Turner *v.* Fisher, 4 Sneed, 211; Bayless *v.* Bayless, 4 Cold., 359; Rocco *v.* Cicalla, 12 Heis., 508; Bell *v.* Hunter, 3 King's Dig., 5314, 5315.

5. SAME. *Funeral expenses refunded to administrator out of proceeds of realty.*

Where the administrator of an insolvent estate has paid on funeral expenses an amount in excess of the personal assets, the

same will be refunded to him out of the proceeds of the realty in preference to all debts that are not specific liens thereon. (*Post, p. 240.*)

6. SAME. *Compensation of administrator and his attorneys.*

Reasonable compensation will be allowed the administrator and his attorneys for services necessarily rendered in obtaining sale of lands of an insolvent estate for payment of debts, and same will be paid as a preferred claim out of the proceeds of the realty when there is no personalty, or it has been exhausted. Such compensation should be fixed with reference to the entire estate and services. (*Post, pp. 240, 241.*)

Case cited and distinguished: Loague *v.* Brennan, 86 Tenn., 634.

7. HOMESTEAD. *Its priority over debt for borrowed money.*

Homestead of widow and children prevails over a debt of the decedent for money borrowed by him of a third person to pay off the purchase price of the lands in which the homestead is claimed, though secured by the husband's mortgage thereon in which the wife did not join. (*Post, pp. 241–245.*)

Constitution construed; Art. XI., § 1.

Code construed: § 2935 (M. & V.).

Cases cited and approved: Gray *v.* Baird, 4 Lea, 212; Bently *v.* Jordan, 3 Lea, 353; 99 Am. Dec., 574; 85 N. C., 93; 88 N. C., 234; 6 Braden (Ill.), 517; 100 Ill., 362; 39 Am. St. Rep., 339; 50 Ill., 521.

Cited and overruled: Guinn *v.* Spurgin, 1 Lea, 228.

8. SAME. *Liberal construction of statutes allowed.*

Doctrine reaffirmed that statutes providing for homestead are liberally construed in favor of that right. (*Post, p. 241.*)

Case cited and approved; Jackson *v.* Shelton, 89 Tenn., 82.

FROM JACKSON.

Appeal from the Chancery Court of Jackson County. B. M. WEBB, Ch.

W. B. & M. G. BUTLER, GEO. H. MORGAN, and JOHN A. PITTS for Loftis.

MURRAY & SON, M. B. YOUNG, and J. T. ANDERSON for Brooks.

B. A. BUTLER, *Guardian ad Litem.*

WILKES, J. There is a multiplicity of pleadings in these consolidated causes, which it is not necessary to notice critically. The cause as finally presented is a proceeding to wind up the estate of H. P. Loftis as an insolvent estate, to sell his lands for the payment of his debts, to declare the rights of his widow and children and the creditors of the estate, and fix their priorities *inter sese* in the assets of the estate, consisting now entirely of the proceeds of real estate, a small amount of personal property, less than $100, having already been consumed in the payment of burial expenses.

It is made to appear in the record that, prior to the filing of the bills in this cause, by a proceeding in the County Court of Jackson County, dower and homestead were assigned to the widow of the intestate, and the amount in money of her year's support fixed; but only a few dollars had been paid by the administrator upon the latter, leaving $264.44 unpaid on this account.

It further appears that the administrator had paid out all the personal assets in his hands—a small amount—on the year's support, to wit, $17, and

the remainder on the burial expenses, and had used of his own individual funds, for the latter purpose, $29.28, which had not been repaid to him.

It further appears that intestate in his lifetime bought a tract of land—the same now sought to be sold—from one Kirkpatrick for about $3,000; that, in order to finish paying for the same, he borrowed $300 from his wife out of her separate property, and from R. V. Brooks about $1,000, which he used in paying off the purchase money. He executed his notes to Brooks for the amount borrowed from him, and, to secure the same, gave a trust deed upon the land he had bought—the same now in controversy—and the deed of trust recites upon its face that the notes are executed for money with which the purchaser paid part of the purchase money for the land thus conveyed in trust. It contains the usual power of sale in case of default. This trust deed was not signed by the wife, but was regularly acknowledged by the husband and registered. For the $300 loaned by the intestate's wife no note was given; but the fact of the loan, and that it was her separate estate, derived from a sale of her father's land for division among his heirs, is abundantly shown. The agreement under which this $300 was furnished and used is somewhat indefinite and uncertain under the pleadings and proof. The widow died pending the litigation, and the question of her dower rights is thus eliminated from the controversy. She left minor children, who are

presumably in possession of the homestead, though this does not definitely appear; and these minor children insist upon their right to homestead, under the statute, in the land sought to be sold.

J. M. Loftis, the administrator of the husband, was also made administrator of the wife, and he is before the Court in both capacities.

The Chancellor, upon the hearing, held that the widow had established a right to a resulting trust in the tract of land to the extent of the $300, contributed by her to be used in paying for it, and that, by virtue of this resulting trust and interest thus acquired in the land by her, she became tenant in common with her husband in the land, and she and her children were not, therefore, entitled to homestead in the same, but she was entitled to have the $300, and interest, paid back to her out of the proceeds of the land when sold. He also held that, the personal property of the estate having been exhausted, the land should be sold, and, after paying the widow's demands, as above shown, the mortgage debt should be paid, and the remainder distributed *pro rata* among the general creditors of the estate. A reference was had to report the debts against the estate, and the report, as made, did not embrace the balance of the year's allowance to the widow, nor the amount advanced by the administrator out of his own funds, as valid debts against the estate, and refused the administrator any allowance for his services.

The cause is here by appeal on the part of the

administrator. An appeal was prayed for the minors, by their guardian *ad litem*, acting also as their next friend, but this appeal was, by the Court below, refused, on the ground that a guardian *ad litem* had no right of appeal. In this the Court erred. A guardian *ad litem* and next friend of minors has a right to appeal whenever, in his discretion, it is necessary to protect the interest of his wards, to the same extent as any other person may upon tendering proper bond, which was done in this case. The guardian *ad litem* excepted to the action of the Court, and, while his bond for appeal is copied into the record, there is no bill of exceptions making it part of the record, and the transcript is not filed for writ of error. It appears, also, that the minors attempted to appeal in proper person, and a bond is executed for them with security. While the appeal prayed by and for them is not regularly and properly perfected, and the case is not properly in this Court because of such attempt to appeal, still there is a broad appeal by the administrator and creditors of the estate, raising the question of the rights of all parties in the estate, including the minors, and their rights can properly be adjudicated under this record.

We think the Chancellor was in error in holding that the wife of the intestate acquired an interest in the lands of her husband, under the idea and doctrine of a resulting trust, to the extent of the $300 contributed by her to the payment of the purchase

money of the land. Neither the pleadings on the part of the wife nor the proof in the cause make out a case of resulting trust in the wife.

In her cross bill, attempting to set up this trust, she says the agreement, when she furnished the $300, was that the land, to that extent, should be hers; but, again, she adds that it was the agreement that she was to have a lien upon the land to the extent of the money furnished by her, superior to the rights of all others, as it was for borrowed money. She prays that the land be sold, and $300 and interest be repaid to her, and, if this cannot be done, then that a resulting trust be declared to that extent in the land, and her right to recover to that extent be declared superior to the rights of all others.

The proof on this branch of the case is full and satisfactory as to the fact that she furnished the money, and that it was hers, and was used in paying off the purchase money, but it is indefinite as to the agreement under which it was furnished and to be used.

Her brother, H. H. Johnson, from whom she received the $300, states that the agreement between the husband and wife was that he would pay her back out of the land, and that the land should stand good for the money she put into it, and that, in any event, she should not lose the money furnished by her and put into the land.

John M. Loftis, one of the intestate's brothers,

states that the agreement was that the land should stand good for the money, and that she should have her interest in the land.

J. M. Loftis, another brother, and the administrator, states that it was agreed that she was to have her money out of the land, and hold her interest in the land until it was paid back to her.

There is no proof of any agreement that any particular portion of the land should be hers, nor is there any evidence of any agreement that the title to the land, or any part of the same, should be taken in her name.

Under these pleadings and proof, we do not think the widow establishes any resulting trust, but merely shows an oral agreement for a lien or charge upon the land in her favor until the amount contributed by her, with interest, could be repaid to her, and it was not contemplated that her money was to remain invested in the land permanently, nor that she was to have any specific interest in or part of the land. This oral agreement for a charge or lien upon the land, fixed no lien in her favor as against the husband's mortgage or general creditors, but her administrator is entitled to prove the same as a general debt against the estate without lien or priority.

The Chancellor was correct in holding that the amount set apart by the County Court, to be paid in money, as a year's support for the widow, could not be proven as a debt to be paid out of the pro-

ceeds of the real estate, which are now the only assets of the estate. The year's support can only be set apart out of money or other personal property, choses in action, etc. Code (M. & V. Comp.), §§ 3125, 3126. And the property set aside must be actually on hand or due. Code, § 3126; *Rice* v. *Hunt*, 7 Lea, 33; *Turner* v. *Fisher*, 4 Sneed, 211. It cannot be, for so much money, charged on the assets of the estate generally. *Bayless* v. *Bayless*, 4 Cold., 359; *Rocco* v. *Cicalla*, 12 Heis., 508. And it is not chargeable on the real estate of the deceased. *Bell* v. *Hunter*, 3 King's Digest, §§ 5314, 5315.

The Court was in error in not allowing the amount paid out by the administrator on the burial expenses, out of his own means, as a debt against the estate, and in not making it, under the facts, a preferred debt, after such debts as are specific liens on the land. He was also in error in not allowing the administrator compensation for his services in a reasonable amount. In case of insolvent estates, when it becomes necessary for the administrator to sell lands for the payment of debts, he should have a reasonable allowance for his services, which are sometimes onerous and always more or less charged with responsibility and labor; and this is true also as to such reasonable attorneys' fees as may be necessarily incurred in selling the lands and paying out the proceeds, and these amounts are also chargeable on the proceeds of the real estate,

when the personal property is exhausted or there was none in the first instance. Such compensation and fees should be preferred when the sale is caused by the administrator, and the entire estate and service should be taken into consideration in fixing the amount. This is not the case of a public administrator, as was the case of *Loague* v. *Brennan*, 2 Pickle, 634, and there is no conflict with it.

The question of the right of the widow and minor children to homestead is one of difficulty, on which there is a conflict of authority in the several States, and in our own State. It has been held, time and again, that the homestead right must be favored and the statute liberally construed to protect it. *Jackson, Orr & Co.* v. *Shelton*, 5 Pickle, 82, where the authorities are collated. The Constitution provides that "the exemption shall not operate against public taxes nor debts contracted for the purchase money of such homestead or improvements thereon." Art. XI., Sec. 2. The statute, M. & V. Code, § 2935, provides that it shall not be exempt from sale for the payment of public taxes legally assessed upon it, or from sale for the satisfaction of any debt or liability contracted for its purchase or legally incurred for improvements made thereon. The difficult and important question is presented in this case, whether money borrowed from a third person to pay off the purchase money due the original vendor or his assignee is a debt or liability contracted for the purchase in the sense of the stat-

ute and constitutional provision. The conflict of authority upon this point in other States is forcibly presented in the text-books. See Waples on Homestead and Exemptions, pp. 337–346; Thompson on Homestead and Exemptions, Secs. 338–347. See also *Magee* v. *Magee*, 99 Am. Dec., 574, note.

It is said, in Thompson on Homesteads, that it is impossible to extract any consistent rule from the cases; and in Waples on Homestead it is said that the holding in each State is largely dependent on the exact language of the statutory provision. It can serve us but little purpose to examine the authorities of the different States in order to fix the rule in our own. After all, the matter resting wholly upon constitutional and statutory provisions, the rule to be adopted is more properly one of public policy under our statute than of conformity to the decisions of other States.

We think there is a marked difference between purchase money and money borrowed to pay off purchase money, and that a debt or liability contracted for the purchase of land means a debt which has for its immediate and original consideration such purchase. So long as the original consideration of the debt remains—the purchase of land—the homestead cannot prevail as against it, even though the debt be assigned or renewed or extended. *Bently* v. *Jordan*, 3 Lea, 353; *Smith* v. *High*, 85 N. C., 93; *Fox* v. *Brooks*, 88 N. C., 234; *Kimble* v. *Esworthy*, 6 Braden (Ill.), 517; *Williams* v. *Jones*,

100 Ill., 362. But when the original purchase money is paid by the use of other money borrowed from a third person for that purpose, the consideration of the debt is no longer purchase money, but borrowed money, and the debt incurred for borrowed money is not superior to the homestead. If we hold that money borrowed to pay off purchase money must be held superior to the homestead, then, it logically follows that money borrowed to pay off such borrowed money must also be held superior, and this rule must continue through as many removes and borrowing transactions as the needy debtor may be forced to make through a series of years, until he is able to discharge all obligations based upon the original borrowing. This would not be a sound rule, nor in accord with the trend of our decisions favoring and protecting the homestead. The priority extended to debts contracted for the purchase money of land is not the same as the vendor's lien for purchase money, and is in nowise dependent on the question whether the vendor has retained such lien. It is a separate lien charge or incumbrance, arising out of the statute and constitutional provisions, and may be enforced by judgment and execution at law, irrespective of the vendor's lien. The party who pays off such purchase money is not thereby substituted to the priority in favor of the original debt, and, if he secure himself by mortgage, his rights will depend upon the mortgage, and not upon the original transaction.

It may be said that it is unjust to allow the purchaser to claim the homestead when he has not, in fact, paid for the same, but it is no more unjust than it is to allow the purchaser of any other property, real or personal, to retain the same when it has not been paid for. Besides, it cannot, in our view, be said that the debt incurred for the purchase money is unpaid, when it has been discharged by the creation of a new obligation, based primarily upon another consideration.

When money is borrowed by the purchaser after the purchase has been made, and by him paid in discharge of the original purchase money, it is no longer a debt incurred for the purchase, for that is paid, but is for borrowed money, and it has no priority as against the homestead because of its use in paying off purchase money. *Eyster* v. *Hathaway*, 50 Ill., 521; *Magee* v. *Magee*, 99 Am. Dec., 574; *Druse* v. *Myers*, 39 Am. State Rep., 339; Thompson on Homesteads, Secs. 342, 343.

In accord with this view is our case of *Gray* v. *Baird*, 4 Lea, 212, and opposed to it is the case of *Guinn* v. *Spurgin*, 1 Lea, 228. The latter case cannot be sustained upon the ground upon which it is placed, and it is overruled. Whether that case could be sustained upon the idea that in effect Spurgin became the purchaser from Bowers and sold to Guinn, so that the debt from Guinn to Spurgin was really a debt contracted for the purchase money, we need not consider, as the decision is not rested upon that idea.

We are of opinion that neither the mortgage debt to Brooks, nor the $300 debt to Mrs. Loftis, has priority over the homestead right of the widow and minor children in the land in controversy in this case. The result is, the Chancellor's decree must be reversed and modified so as to conform to this holding.

The cause will be remanded to the Court below, to the end that the land may be sold, subject to the homestead right of the minors, or otherwise as the Court may direct, so as to protect the minors in their homestead rights as superior to all other claims. Out of the proceeds will next be paid the costs which have accrued, and may accrue, in the Court below and in this Court; next, the mortgage debt to Brooks, with proper interest; then the amount advanced by the administrator, out of his own means, to pay burial expenses, with proper interest; next, reasonable compensation to the administrator for his services, as well as reasonable attorneys' fees for him and for the guardian *ad litem* of the minors, and then the remainder *pro rata* among the general creditors of the estate, including the $300 debt of the administrator of the widow, and interest, and such other debts as may be properly proven, but excluding the balance of the year's support to the widow, which cannot be allowed out of the proceeds of the land.

The costs of this Court and the Court below will be paid out of the proceeds of sale of the lands.

ZWINGLE *v.* WILKINSON.

(*Nashville.* January 12, 1895.)

1. PAYMENT. *Recital of in decd.*

Recital in deed that consideration has been paid is only *prima facie* evidence of payment, and may be rebutted by proof. (*Post*, *p.* 248.)

2. VENDOR'S LIEN. *Exists when.*

A vendor's lien is implied by law, though none is expressly retained by contract, to secure the unpaid purchase price of lands sold and conveyed. (*Post*, *pp.* 248, 249.)

Cases cited and approved: Campbell *v.* Baldwin, 2 Hum., 248; Marshall *v.* Christmas, 3 Hum., 616; Fogg *v.* Rogers, 2 Cold., 290.

3. SAME. *Not waived or lost, when.*

The vendor's implied lien for the unpaid purchase price of land is not waived or lost by reason of a recital in the deed that the consideration has been paid, if, in fact, payment had not been made. (*Post*, *p.* 249.)

Cases cited and approved: Bentley *v.* Jordan, 3 Lea, 361; Baxter *v.* Washburn, 8 Lea, 16; Hill *v.* McLean, 10 Lea, 113.

4. SAME. *Same.*

The vendor's implied lien for the unpaid purchase price of land is not abandoned or lost where the note for same is, by agreement, made payable to a third person, instead of the vendor. (*Post*, *pp.* 249–251.)

Cases cited and approved: Moore *v.* Stovall, 2 Lea, 543; O'Conner *v.* O'Conner, 88 Tenn., 76; Trent *v.* Kyle, 1 Heis., 663; Whitehurst *v.* Yandall, 7 Bax., 228; Thompson *v.* Thompson, 3 Lea, 126; Hamilton *v.* Gilbert, 2 Heis., 682.

Cases cited and distinguished: Green *v.* Demoss, 10 Hum., 372; Thompson *v.* Pyland, 3 Head, 537.

5. SAME. *Same.*

The vendor's implied lien for the unpaid purchase price of land is not lost or impaired by reason of judgment having been obtained for the amount due. (*Post, p. 251.*)

FROM WARREN.

Appeal from Chancery Court of Warren County. W. S. BEARDEN, Ch.

W. W. FAIRBANKS, S. T. O'NEAL, and WM. T. MURRAY for Complainant.

F. M. SMITH for Defendant.

CALDWELL, J. This is a suit in chancery for the enforcement of an alleged vendor's lien.

An epitome of the material allegations of the bill is as follows: That on November 15, 1888, M. V. Gribble sold and conveyed a certain tract of land in Warren County to the defendant, T. B. Wilkinson, for the consideration of $1,000, which the deed recited "was paid in hand;" that, in fact, only $633.75 were paid, and the vendee, by agreement of all parties concerned, executed his promissory note to A. J. Gribble, a creditor of the vendor, for the remaining $366.25; that A. J. Gribble sued Wilkinson upon the note, after maturity, and obtained judgment against him, before a Justice of the Peace, for the sum of $446.58, principal, interest, and

costs; that A. J. Gribble thereafter died, intestate, and the complainant, C. C. Zwingle, was duly appointed administrator of his estate; and, finally, that the said judgment, which remains wholly unpaid, is an asset of that estate, and is a lien on the said land, representing as it does a part of the purchase money. The defendant, answering, admitted all the facts alleged in the bill, but denied that either the note or the judgment was a lien on his land.

The Chancellor granted the relief sought by complainant, and the defendant appealed.

The recital in a deed that the consideration has been paid, like an ordinary receipt for money, is only *prima facie* evidence of payment, and, consequently, it may be rebutted by satisfactory proof to the contrary. The *prima facie* case made by such recital in the deed before us is effectually rebutted to the extent of $366.25 by the admission of the defendant in his answer. That the defendant still owes so much of the purchase money, with its interest, and that the same is due to the complainant as administrator, are facts fully admitted.

If the note for the $366.25 had been executed to M. V. Gribble, the vendor, and he were still the owner of the debt, there could be no question that he would have a lien on the land; for, whenever land is sold and conveyed, and the purchase price, or a part of it, remains unpaid, an equitable lien arises, by operation of law, in favor of the vendor. In every such case, though there be no stipulation

to that effect, the vendor is presumed to look to the land as security for his debt, unless it be shown that he has waived that right. *Campbell* v. *Baldwin*, 2 Hum., 448; *Marshall* v. *Christmas*, 3 Hum., 616; *Fogg* v. *Rogers*, 2 Cold., 290.

A statement in the face of the conveyance that the consideration has been paid is not a waiver of the vendor's lien, if, in point of fact, payment has not been made. 2 Story's Eq. Jur., Sec. 1225; 3 Lea, 361; 8 Lea, 16; 10 Lea, 113.

Can the fact that the note for the $366.25, balance of purchase money, was, by agreement, executed to a person other than the vendor, make any difference with respect to the equitable liability of the land for its payment? We think not, clearly. All the parties evidently intended that A. J. Gribble, to whom the note was given, should be placed in the situation of vendor with respect to it; and such was the legal effect of what was done. As to that part of the purchase money, all the rights of the real vendor inured to his benefit. It was not the case of a vendor transferring his vendee's note to another person, thereby suspending or extinguishing his equitable lien, as in *Green* v. *Demoss*, 10 Hum., 372; *Thompson* v. *Pyland*, 3 Head, 537, and other like cases; but the note was executed directly to A. J. Gribble, complainant's intestate, as if vendor, and nothing has since been done to impair his situation. He was the original payee, and from the first was entitled, as the actual vendor would have

been, to look to the land for the satisfaction of the note. The presumption of reliance upon the land as security for the debt, the personal obligation of the vendee, and the relation of the note to the land are precisely the same as they would have been if M. V. Gribble, the actual vendor, had been the payee of the note, and he had continued to be its owner.

It is competent for vendor and vendee of land to contract that the latter shall pay the purchase price, or a part of it, to some other designated person, and, when it is so agreed, such other person may enforce against the vendee such rights as it was intended he should have. *Moore* v. *Stovall*, 2 Lea, 543; *O'Conner* v. *O'Conner*, 88 Tenn., 76. So, where land is sold by title bond which provides that the whole or a part of the consideration shall be paid to a third person named, the legal title retained by the vendor inures to the benefit of that person, and he has a lien on the land for the sum required to be paid to him. *Trent* v. *Kyle*, 1 Heis., 663; *Whitehurst* v. *Vandall*, 7 Bax., 228.

A third person, to whom an absolute deed in fee, without reservation of lien, recites that a portion of the purchase money shall be paid, so far stands in the room and stead of the vendor himself as to have an equitable lien on the land for the amount designated. *Thompson* v. *Thompson*, 3 Lea, 126.

The principle controlling the last three cases is the same as that we have applied in the case at

bar, and the only difference between the last case and this one, upon their facts, is that in that one the obligation of the vendee to make payment to a third person was expressed in the deed, while in this one it is evidenced by a promissory note—a difference which we regard as wholly unimportant.

The case of *Hamilton* v. *Gilbert*, 2 Heis., 682, is even more like the present one. There the vendee, by request, executed two notes for parts of the purchase money to the daughter of the vendor. The Court, in a suit upon those notes, said: "By the execution of the notes to her, she is subrogated to the rights of the actual vendor, and * * * stands in the same relation as if she had made the deed herself, and Gilbert, by executing the notes to her, is estopped to deny her equitable lien."

The lien of the note in the present case, though but an equitable one, was not lost or impaired by the suit and judgment before the Justice of the Peace; but the judgment, like the note, stands for the purchase money, and is secured by the same lien upon the land.

Though not discussed, or mentioned, in the opinion of the Court in *Hamilton* v. *Gilbert*, *supra*, this question was raised by the facts of that case, and must necessarily have been decided as it is here decided. There, as here, a bill in equity was filed, and a lien declared to exist after suit before a Magistrate.

Affirm.

FRY *v.* SHIPLEY.

(*Nashville.* January 14, 1895.)

1. WILLS. *Pass money and notes, when.*

Money on deposit and promissory notes pass to the legatee under the residuary clause of a will bequeathing to him "all the money arising from the sale of my stock of every kind, and all of my loose property of every kind, which I direct to be s ·ld as the law directs." (*Post, pp. 254–262.*)

Cases cited and approved: Jarnagan *v.* Conway, 2 Hum., 50; Maddox & Geldart's Rep., 119.

2. SAME. *Same.*

"Loose property" is synonymous with "movables" or personal property. Its meaning in this will is not restricted by the preceding clause to property of the nature of "stock" under the rule of *ejusdem generis*, nor by the subsequent clause directing sale. (*Post, pp. 258–260.*)

Cases cited and approved: Jarnagan *v.* Conway, 2 Hum., 49; Williams v. Williams, 10 Yer., 25; Edmondson *v.* Edmondson, 1 Tenn. Ch., 568.

3. SAME. *Rules of construction illustrated.*

Illustrations of the following rules of construction will be found in this opinion: (1) That a testator is presumed not to intend to die intestate as to any part of his property, and the Courts will resort to any fair and reasonable interpretation to prevent partial intestacy. (2) The testator's intention should be ascertained from the will itself, but the Courts will look to the facts and conditions surrounding him. (3) Grammatical construction of the language of a will ordinarily prevails, but the Court may transpose, reject, or supply words to carry out the testator's clearly ascertained intention. (*Post, pp. 255–258.*)

Fry *v.* Shipley.

Cases cited and approved: Williams *v.* Williams, 10 Yer., 25; Reid *v.* Hancock, 10 Hum., 368; Simpson *v.* Smith, 1 Sneed, 394.

FROM WHITE.

Appeal from Chancery Court of White County. B. M. WEBB, Ch.

W. J. FARRIS, M. A. CUMMINGS, W. T. MURRAY, STORY & GOFF for Complainants.

SNODGRASS & SMITHS, ADCOCK & ROBINSON for Defendants.

BEARD, J. Nehemiah Rutherford died in White County, in this State, possessed of a considerable real and personal estate, and leaving a last will and testament, which was duly admitted to probate in that county. His estate consisted in part of $6,000 on deposit in the Bank of Sparta and about $1,500 in promissory notes. The complainants are of the next of kin of the testator, not provided for in his will, and they file this bill asking for a construction of this instrument and alleging that, as to this money and these notes, the testator died intestate, and that, as the result of such intestacy, they, with other distributees, named as defendants, are entitled to share in this part of his estate. Among the defendants to the bill is one J. W.

Orr. He is a devisee as well as one of the legatees of the will, and, as legatee, claims the funds in question under its fifth item or clause. This suit is narrowed to a controversy over this clause. For a proper understanding of this controversy, we embody in this opinion the various clauses of this will, as follows:

"*First.*—I direct that my funeral expenses and all my debts, if any, be paid as soon after my death as possible, out of any moneys that I may die possessed of, or may first come into the hands of my executor.

"*Second.*—I will and bequeath to my nephew, James W. Orr, my entire farm, or all the lands I own, or, in case that I should sell the same before I die, the proceeds is to be his.

"*Third.*—I direct, if there is any money on hand at my death, that my executor purchase out of the same a one hundred dollar tombstone and place it at the head of my grave, and should there be no cash on hand at my death, then, in that event, it is to be bought as soon as the money can be collected from my cash notes.

"*Fourth.*—I will and bequeath to Adaline, the colored woman now living with me, one hundred dollars, to be paid as soon as practicable by my executor, for her services since the late war.

"*Fifth.*—I will and bequeath to my nephew, James W. Orr, all the money arising from the sale of my stock of every kind, and all of my loose property

of every kind, which I direct to be sold as the law directs.

"*Sixth.*—The testator provides for the appointment by the County Court of an executor.

The general rules for the construction of a will, so far as it is necessary for them to be stated, are here given:

1. The Court is to ascertain the intention of the testator, and this intention is to be found within the will itself (Pritchard on Wills, Sec. 384), but this rule does not forbid a reference to the facts or conditions under which it was made. Pritchard on Wills, Sec. 409; Schouler on Wills, Sec. 466.

2. The presumption is that a man who undertakes to make a will does not intend to die intestate as to any part of his property, and the Court will place such a construction upon the instrument as to embrace within its operation all the testator's property, if this can be done by any fair interpretation or allowable implication. Pritchard on Wills, Sec. 386; *Williams* v. *Williams*, 10 Yer., 25.

3. The grammatical construction of the instrument must prevail where a contrary intention does not appear (Pritchard on Wills, Sec. 394); but where a grammatical construction would frustrate this intention, or where the words used are unintelligible, obscure, or absurd, and give no effect to the testator's manifest legal intention, then, in order to effectuate this, the Court may transpose, reject, or supply words. Pritchard on Wills, Sec. 395; *Reid*

v. *Hancock*, 10 Hum., 368; *Simpson* v. *Smith*, 1 Sneed, 394.

In the light of these rules, it will not be a difficult matter to ascertain the intention of the testator in this instrument. Rutherford was an old man, without wife or lineal descendants. He had lived on his farm in White County for a great number of years, where, by his frugality, he had accumulated a considerable estate. So far as this record shows, he lived alone, except for the fact he had in his service the negro woman, Adaline, who is mentioned in his will, and her husband. He was one of a family of eleven children, of whom he was the only survivor. His brothers and sisters were long since dead, leaving descendants scattered through several States. None of these lived in White County. No friendly intercourse seems ever to have existed between the testator and any one of these relatives, save in the case of his devisee and legatee, James W. Orr. This latter was a nephew, living in the eastern part of the State. For some reason, the uncle evinced a strong attachment for him. Their relations were of a very friendly character. Rutherford was an intense partisan, and their political sympathies were the same. At intervals they exchanged letters, and, at still longer intervals, this nephew made visits to his uncle, the latter generally soliciting the visit, and always paying the expense of the trip. While the testator was by nature and habit a secretive man in regard to his es-

tate, and especially as to his money, yet he talked, during these visits, freely with his nephew about the value and character of his property, and sought advice from him as to investments, and gave him indications as to the final disposition of his property. It was this kinsman whom he desired to have at his bedside when death occurred; and it was his expressed wish that this nephew should finally take his estate, to the exclusion of his other relatives.

This preference, indicated by conversation and correspondence, was no less manifested in the testator's last will. Orr, of all his numerous and scattered relatives, is the only one mentioned or provided for in this instrument, and to him is given the farm, which complainants allege to be "very valuable," and "all the money arising from the sale of his stock of every kind, and all his loose property." In fact, he is given all of the estate which shall be left after the payment of the small legacy to his old servant, and of his debts and funeral expenses, including the purchase of a tombstone, unless it be, as complainants insist, that the money and choses in action were undisposed of. Having indicated in his social relations, and in his will, this decided regard for his nephew, and his purpose to make a generous provision for him, it would be, at least, remarkable that this testator should have been willing to die intestate as to so considerable a part of his estate, and to leave it for distribution among collateral kindred to whom he had been so indifferent in life.

On the contrary, we think, it cannot be otherwise than that the testator intended by this will to dispose of all his property, and that he died supposing he had done so. The question is, Has he used apt words to effectuate this intention? The answer to this question depends upon the construction of the fifth clause therein.

It will be seen the testator, before reaching this item, has already provided for the payment of his debts, etc., and has disposed of his realty, or its proceeds if it should be sold by him during his life. In other words, in the preceding clauses of the will, after providing for debts, etc., he has given all of his estate to his nephew, except the personalty, and this fifth item deals with that exclusively. If, in that clause, the testator had said, "I will and bequeath to my nephew, James W. Orr, all the money arising from the sale of my stock of every kind, and all my property of every kind," and had stopped there, then there could be no question but that these words would have carried to the legatee the title to both the money and notes in controversy, for the word "property" is a generic term, and includes both real estate and personalty of all kinds, unless the context shows it to used in a more limited sense. Pritchard on Wills, Sec. 416; Schouler on Wills, Sec. 510. And it has been frequently held to embrace money and securities. *Arnold* v. *Arnold*, 2 Mylne & Keene, 365; *Pell* v. *Ball*, Spear's Ch., 48; *Hurdle* v.

Outlaw, 2 Jones' Eq., 75; *Stuckey* v. *Stuckey*, 1 Hill's Ch. (S. C.), 308; *Jarnagan* v. *Conway*, 2 Hum., 50. This being so, it cannot be that the use of the qualifying word "loose," before the word "property," works so radical a change in the latter as to exclude from its operation what would otherwise be within it on the plainest principles of construction. While it is an unusual word to use in the description of personalty, it is not an inapt one. In fact, one of its meanings, and evidently the one which was in the mind of this testator, is "not fixed," or its equivalents; "not stationery," or "susceptible of motion," and in this respect the terms "loose property," correspond with the word "movables," used by the law writers to cover all kinds of personal property, as contradistinguished from fixed or immovable property.

But it is insisted that the rule of *ejusdem generis* is to be applied here, and that the words "loose property" are limited in their effect by those preceding, to wit: "Stock of every kind." We do not think so. This is a residuary clause, and the use of the word "all" indicates clearly that the word "property" is not to be limited to the character or kind of property described in the clause preceding. It is sufficient on this point to refer to the cases of *Jarnagan* v. *Conway*, 2 Hum., 49; *Williams* v. *Williams*, 10 Yer., 25; and *Edmondson* v. *Edmondson*, 1 Tenn. Ch., 568.

But it is insisted that the words, "which I direct

to be sold as the law directs," necessarily exclude from the operation of the preceding phrase, "property of every kind," money, and promissory notes. To this contention it may be replied, it being, as before stated, a well settled rule of construction, that when this testator came to perform so solemn an act as to make his last will and testament, it will be presumed that it was not his intention to die intestate as to any part of his property; and, in addition, as the facts surrounding the execution, as well as the phraseology, of the instrument indicate clearly, it was the purpose of this testator to make James W. Orr his residuary legatee, the Court, in order to carry out this intention, will transpose, reject, or supply words, if it be necessary. For instance, this clause may be read as follows: "I will and bequeath to my nephew, James W. Orr, all the money arising from the sale of my stock of every kind, which I direct to be sold as the law directs, and all my loose property of every kind." The objection of tautology would not be more tenable after than before the transposition, because, both before and after the change, the testator gives "the money arising from the sale," etc., "which I direct to be sold as the law directs," etc.

But it is unnecessary to transpose in order to carry out the intention of the testator to make James W. Orr his full residuary legatee. This direction to sell, at the most, only implies uncertainty in the mind of

the testator as to what his personal estate may consist in at his death, and his intention that this residuary personal property, whatever its nature, shall be converted or collected for the benefit of the residuary legatee.

The case of *Hearne* v. *Wiggenton*, Maddox & Geldart's Rep., p. 119, was similar in many respects to the one at bar. In that case, the testator bequeathed various legacies of different kinds, such as wearing apparel, beds, bedding, as well as sums of money, to different legatees. One of these legatees was H, to whom was given, in one of the earlier clauses of the will, the sum of ten pounds. This same party, H, was made the residuary legatee in these words: "And all my other effects I will to" H, "to be sold for his benefit," and the question was, whether, under this clause, money in the funds passed, or only the residue of the testator's goods. The conclusion of Sir John Leach, Vice Chancellor, on this clause, was as follows: "The rule in question is, whether a general residuary gift is to be limited and qualified to property which is the subject of sale; however, the testator has added that his residuary property is to be sold for the benefit of his residuary legatee. It is uncertain at the making of the will what the testator's property may consist of at his death, and the direction to sell implies only a general intention on the part of the testator that his residuary property shall be converted or collected for the benefit of his residuary legatee."

So, in this case, we say, the manifest purpose of this testator was, that his residuary personal property, of all kinds, should be collected or converted for the benefit of his residuary legatee, James W. Orr. The Chancellor having held otherwise, his decree is reversed, and the bills of the complainants are dismissed. The complainants will pay the costs of this Court and the Court below.

BON AIR COAL, ETC., CO. *v.* PARKS.

(*Nashville.* January 14, 1895.)

1. STATUTE OF LIMITATIONS. *Seven years' adverse possession.*

Seven years' adverse possession of previously granted lands held under an entry, or in part under an entry, and remainder under grant thereon, but for less than seven years under the grant, invests the possessor, not with the fee, but with a possessory right to all the lands described in the entry. (*Post, pp. 265, 266.*)

Cases cited and approved: Sims *v.* Eastland, 3 Head, 369; Ramsey *v.* Monroe, 3 Sneed, 329.

2. SAME. *Same.*

A entered, as a naked trespasser, upon a large tract of land belonging to B, and inclosed and held forty or fifty acres of it for the term of seven years, openly, continuously, and adversely, thereby acquiring a possessory right to that portion of the land. After acquiring this possessory right, A obtained an entry for a larger portion of B's lands, but including the portion previously inclosed. A's possession was continued for seven years after this entry, but was never extended beyond his original inclosures.

Held: A's possession extended to the boundaries of his entry, and invested him with a possessory right to all the land therein embraced. (*Post, pp. 266–272.*)

Cases cited and approved: Ramsey *v.* Monroe, 3 Sneed, 330; Rutherford *v.* Franklin, 1 Swan, 320; Sims *v.* Eastland, 3 Head, 367.

Cases cited and distinguished: Smith *v.* Lee, 1 Cold., 553; Coal Creek, etc., Co. *v.* Ross, 12 Lea, 9; Peck *v.* Houston, 5 Lea, 227.

FROM WHITE.

Appeal from Chancery Court of White County.

B. M. WEBB, Ch.

SMITH & DICKINSON and W. G. SMITH & SONS for Complainants.

JARVIS & STORY for Defendants.

MCALISTER, J. This is an ejectment bill to recover a tract of land situated in White County, and containing eleven hundred and seventy five acres.

Complainant shows that it acquired this land in 1886, by warranty deed from Dibrell, and deraigns its title through connected conveyances from the State of Tennessee. Complainant's entry was made January 3, 1835, and his grant was issued August 6, 1836. The grant of defendant, Welch, is dated February 9, 1889, and is based upon an entry made February 7, 1882.

The defendant avers that he has been in open, continuous, and adverse possession of said land for more than seven years next preceding the filing of this bill, and he relies upon the statute of limitations of seven years. It appears that complainant's entry and grant were older than defendant's, and, constituting the better title, must prevail unless there has been an actual adverse possession of the land by the defendant.

The proof shows that the defendant, in August, 1874, without color of title, and as a mere naked trespasser, went into possession, inclosing forty or fifty acres of this land, and building double log houses thereon. He has been in open, continuous, and adverse possession of this forty acres ever since,

cultivating it and occupying it as a home. The complainant's counsel, in argument, make a disclaimer as to this inclosure of forty acres, conceding that defendant has acquired a possessory right to it. The defendant's claim, however, is much broader than the possessory right merely to the forty acre inclosure. He claims not only the possessory right, but the absolute title to the entire tract, comprising eleven hundred and seventy-five acres. This claim is based upon the following theory: Defendant, as already stated, went into possession and inclosed forty acres of this tract in 1874, and, remaining continuously and adversely in possession of it, his possessory right to the forty acres became perfected in 1881, under the statute of seven years. In 1882, the defendant made his entry of the entire eleven hundred and seventy-five acre tract, and, continuing to remain in adverse possession of the forty acre inclosure for more than seven years before the filing of this bill, he now claims title to the full extent of the boundaries embraced in his entry. It has been heretofore stated that defendant procured a grant to be issued in 1889, based upon his entry made in 1882.

The Chancellor decreed that the defendant, by reason of his adverse possession of the land under his entry and grant, was vested with the title in fee to the lands described therein, and dismissed complainant's bill.

It will be observed that, between the commence-

ment of the adverse possession under the entry and the institution of the suit, more than seven years had elapsed, but not from the issuance of the grant. It is well settled that possession under a mere entry for seven years will not confer a fee simple title under the first section of the Act of 1819. *Sims* v. *Eastland*, 3 Head, 369. It is obvious that defendant had no color of title until his grant was issued in 1889; and, inasmuch as the grant cannot relate beyond its date as respects the operation of the first section of the Act of 1819, the defendant is in no better situation than if the grant had not issued. *Ramsey* v. *Monroe*, 3 Sneed, 329.

The only question, then, to be determined is, To what extent can the defendant avail himself of an adverse possession under the entry, as a defense to the complainant's claim by the provisions of the second section of the Act of 1819?

It is insisted on behalf of complainants that defendant's possession, under his entry, was simply a continuation of the possession of the forty-acre inclosure acquired in 1874, and that there was no extension of the original possession after the entry was made in 1882. Complainant's contention is that, in order to make the statute of limitation available, it must be shown that defendant, for some years before suit brought, held adversely, not merely the inclosure to which his right of possession had become perfected before his entry, but, by an enlargement of his original boundaries, had taken pos-

session of a part at least of the very land in dispute. It is claimed the occupation by defendant of the land to which he had perfected a possessory right was entirely compatible with complainant's title and constructive possession of the remaining land outside the boundaries of defendant's inclosure. In support of this position, defendant's counsel cite the case of *Smith* v. *Lee*, 1 Cold., 553, in which Judge McKinney said that, "in order to have brought himself within the operation of the principle contended for [the statute of limitations] the defendant must have enlarged his inclosure or have taken actual possession of some portion of the land common to both grants outside of his former improvements."

In the case in 1 Cold., the plaintiff "claimed under a grant for 277 acres, dated December 17, 1838. For several years preceding the date of the plaintiff's entry and grant, the defendant was residing upon, had inclosed and in cultivation, part of the land included in the entry and grant of the plaintiff, and continued to remain in possession. Subsequently to the issuance of plaintiff's grant, the defendant obtained a grant for 135 acres, which not only covered his previous improvement, but extended beyond and covered a considerable portion of unimproved land within the bounds of the prior grant to the plaintiff. The two grants covered in part the same land. The defendant, having remained in possession of his previous improvement upon the land (without enlarging or extending his possession)

for more than seven years from the date of his grant before suit was brought against him, claimed to hold adversely all the land within the boundaries of his grant. The plaintiff had no actual possession of any part of the land within the interference, and the question was, who had the better title to the land embraced within the conflict. In that case the Court held that the entry and grant under which the plaintiff claimed, so far as they interfered with or included any portion of the defendant's occupant improvements, were utterly void on the ground of failure to give the defendant thirty days previous notice, required by the Act of 1824. As already seen, the possession and improvements of the defendant were within the interference or conflict of these two grants; but, the plaintiff's grant being utterly void, for the reason already stated, in legal contemplation, the defendant's occupant improvements still remained vacant until subsequently entered by himself. In this view of the case," says Judge McKinney, "it is obvious that defendant, Smith, had no possession of any portion of the land covered by both grants. It is the invasion of the owner's rights by an actual possession of the land with intent to claim it against the owner, that lays the only proper foundation for the operation of the statute."

It was in this view that Judge McKinney used the language "that, to have brought himself within the operation of the principle contended for, the

defendant must have enlarged his inclosures or have taken actual possession of some portion of the land common to both grants. Until this was done, there could be no possible invasion of the plaintiff's rights—no actual possession within the limits which the law had affixed to his prior grant." That case is not to be assimilated to the case now being adjudged, since it distinctly appears in this case that defendant, Welch, had been in actual adverse possession of a portion of the land covered by his entry for more than seven years preceding this suit, and it is conceded that said possession was within the limits of the prior entry and grant of the plaintiff.

Counsel also rely upon the case of *Coal Creek Mining Co.* v. *Ross*, 12 Lea, 9. In that case it appeared that two of the parties, when they made their entry, as well as when they took out their grants, were in possession of portions of the land under older grants. It will be observed, in this connection, that when Welch took out his entry in 1882, he had been in possession of the land prior to that time as a mere naked trespasser, and had no deed, grant, or color of title.

The Court held in the 12 Lea case that a continuance of possession shown in that case would not be a possession under the new grant. The reason, we observe, was that the law still referred that possession to the limits of the old grant. The Court continues: "In order to get a perfect title to the

extent of the boundaries of the new grant, there must have been an intentional extension of the inclosure and independent improvements openly made under a claim of right by virtue of the new grant." To the same effect is the case of *Peck* v. *Houston*, 5 Lea, 227. But none of these cases support the contention of defendant's counsel. The cardinal differential attribute of these two cases is that the party invoking the protection of the statute of limitations had already been in possession of a part of the land under an old grant, and, after taking out a new grant, failed to extend his possession. In such a case, the law conclusively presumes that the party is still in possession under the old grant. But these cases are wide of the mark in this case. The defendant, relying upon the statute of limitations in this case, had been in adverse possession of the land for seven years prior to his entry, but it was a mere naked possession, without a deed, grant, or other assurance of title. In 1882 he made his entry of 1,175 acres, covering his forty-acre inclosure, and remained in possession of the same inclosure, without extending his possession, for seven additional years. Now, the contention of complainant's counsel is that the defendant's possession cannot be referred to his entry, for the reason he had been in possession for seven years prior to his entry. This is true; but it was a mere naked possession, without color of title. If defendant had had a color of title at that time, his possession would be limited to the bound-

aries of that title, and would not be covered by his subsequent entry, without an extension of his possession.

We think this case comes within the principle laid down by Judge McKinney in *Ramsey* v. *Monroe*, 3 Sneed, 330. In that case it appeared that, on May 22, 1837, a grant was issued to the plaintiff for a tract of land lying in Grundy County, containing 1,000 acres. Afterwards, to wit, on the fourth of March, 1845, one Lazarus Adams made an entry for 300 acres of land, lying entirely within the bounds of the foregoing grant to the plaintiff, Monroe. The defendant, Adams, took possession under said entry and continued to hold, by himself and vendors, for more than seven years prior to the commencement of the suit. It appeared that two fields were inclosed within the bounds of the defendant's entry which had been used and occupied more than seven years before the institution of the suit. On the other hand, there had been no possession on the part of the plaintiff Monroe of any part of the land within the boundaries of his grant. The Court held that the defendant, by virtue of his entry and seven years adverse possession, acquired no title to the land, under the first section of the Act of 1819, for the reason that a mere entry is no color or assurance of title purporting to convey an estate in fee. It was held, however, that defendant had acquired a possessory right, under the second section of the Act of 1819, not

merely to the two inclosed fields, but to the full extent of the boundaries described in the entry.

To the same effect is the case of *Rutherford* v. *Franklin*, *Lessee*, 1 Swan, 320. In that case the Court held that "if a party take possession and hold it adversely by virtue of a title bond, or other instrument vesting the possessor with an equitable interest only, the possession so taken extends to the metes and bounds described in the instrument under which it is taken, so that, although a title is not vested in him, yet, if it be so held for several years, he is protected to the entire extent of such possession." So also in *Sims* v. *Eastland*, 3 Head, 367, the Court said, viz.: "The entry of Gibson was a special one, and would extend the title by possession under the second section (Act of 1819) to the extent of its calls and boundaries." We think these authorities are conclusive of this case.

The decree of the Chancellor is modified and affirmed.

LIEBERMAN *v.* PUCKETT.

(*Nashville.* January 17, 1895.)

SALES OF PERSONALTY. *Purchaser's rights defined.*

Failure of vendor of personalty, who retains title to secure the purchase price, to advertise it for sale within ten days after replevying same upon the vendee's default, does not entitle the latter to recover back the purchase money already paid, when he controverts the vendor's right of possession, under Acts 1889, Chapter 81, authorizing such recovery by the vendee unless such advertisement is made by the vendor within ten days after his regaining possession.

Acts construed: Acts 1889, Ch. 81.

Case cited and distinguished: Cowan *v.* Singer Mfg. Co., 92 Tenn., 376.

FROM DICKSON.

Appeal from Chancery Court of Dickson County. A. J. ABERNATHY, Ch.

NATHAN COHN for Lieberman.

HARDIN LEECH for Puckett.

WILKES, J. Complainants sold defendant an engine, boiler, and sawmill for $1,100, of which $275 was paid in cash, and for the remainder notes were executed, falling due in installments. These

notes were not paid as they fell due, and complainants, having reserved the title to the machinery in their sale, filed this bill to replevy the same, and under it obtained possession of the property. The bill was filed in September, 1891, and process was returnable to March, 1892. At that term defendant, Puckett, filed an answer contesting the right of complainants to retake the machinery, and also made his answer a cross bill, in which he sought to have refunded to him the $275 which he had paid in cash, and to have certain attachments redelivered to him, which were not embraced in the original sale, but were added by the defendant to the outfit after his original purchase.

The Chancellor gave judgment against the defendant for the possession of the property, except the added attachments, and as to this gave judgment for $80 against complainants, and from this there is no appeal. The Chancellor dismissed the cross bill so far as it sought to recover back the cash payment of $275, and defendant appealed, and has assigned as error this action of the Chancellor in refusing to require the purchase money to be refunded. Other questions originally raised have been eliminated, and need not now be noticed.

Appellant bases his right to recover upon the construction of the Act of 1889, Chapter 81, page 117, Sections 1 and 4. This Act provides, in substance, that where any personal property is sold upon condition that the title remain in the seller

until the unpaid part of the consideration is paid, it shall be the duty of the seller, having regained possession of such property, within ten days after regaining such possession, to advertise said property for sale, etc. (Sec. 1); and if the seller, having gained possession, fail to advertise and sell as the Act provides, then the original purchaser may recover from the seller that part of the consideration paid, etc. Sec. 4.

This Act was construed in *Cowan* v. *Singer Manufacturing Co.*, 8 Pickle, 376–384, and that case is relied upon as decisive of this. In that case it was properly held that the duty of the original vendor to resell the property upon reclamation is positive, and failure to perform that duty fixes upon him absolute responsibility to the purchaser for the purchase money previously paid.

The Act clearly contemplates two cases—one where the vendor retakes possession by consent of the purchaser, and the other where it is necessary to regain the possession by process of law in the absence of consent. This can be done by an action of replevin, and if the complainant's right, under his replevin, to hold the property is not controverted, as well as when possession is gained by consent, it is the duty of the vendor to at once proceed, under the statute, to make the sale required. But where the right to retain the possession under the replevin suit is controverted and litigated, the vendor cannot be said to have regained

possession in the sense contemplated by the Act for purpose of sale, but he is obligated to hold that possession to await the determination of the contest over the right to possession; nor can the purchaser, so long as he litigates the right of the complainant to retake and retain possession, require that he shall proceed, at his peril, to make the sale required by the statute.

In this case, although complainants had taken possession under their replevin writ, they must be considered as holding that possession to await, in the first instance, the result of that replevin; and, until their right to possession is conceded or fixed by the Court, they are under no obligation to proceed to sell under the statute, nor could they properly do so.

Complainants' right to retake possession under their contract and the law in such cases is plain, and, in that respect, the Chancellor's decree is correct. He was also correct in dismissing the cross bill and denying a recovery to defendant of the cash paid by him during the pendency and litigation of the replevin suit. The decree as to the eighty dollars is conceded to be correct.

Let the decree be affirmed, with costs.

ROBERTS *v.* MITCHELL.

(*Nashville.* January 17, 1895.)

SET-OFF. *Judgments. Attorney's fees.*

The right to set off independent judgments rendered in different suits, growing out of different causes of action, is subordinate to the attorney's lien for services rendered in obtaining the judgments.

Code construed: § 3635 (M. & V.); § 2925 (T. & S.).

Cases cited and approved: 4 N. H., 347; 62 Maine, 288; 37 N. H., 223; 44 Ind., 270; 8 Fla., 183; 2 Caines, 105; 3 John., 247; 50 Eng. L. & Eq., 59; 15 Vesey. 79, 541.

FROM OVERTON.

Appeal from Chancery Court of Overton County. B. M. WEBB, Ch.

J. D. GOODPASTURE for Roberts.

G. B. MURRAY for Mitchell.

BEARD, J. In this cause, on a former day of the present term, a moneyed decree was rendered in favor of Mitchell against complainant, J. S. Roberts. On a still earlier day of the term, in another and independent suit, a decree was pronounced in favor of Roberts against Mitchell, and a motion is now made

by Roberts to set off these judgments, one against the other, under § 3635 of the (M. & V.) Code. This motion is resisted by the solicitors of Mitchell, unless it be granted subject to their lien for services in obtaining the first decree.

While the attorney's lien upon the judgment recovered for his client, as the result of his professional labor, has been recognized and enforced in this State in a variety of cases, yet, so far as we have been able to discover, the exact questions here involved have not been determined. Elsewhere what is the proper rule in a case like the present has been the subject of much difference of opinion, and the result is, the practice of the Courts of England, and of many of the States of this Union, has been very inharmonious. In the English Courts the claim of the attorney to have his fees and disbursements in a suit paid out of the judgment he obtained has been long recognized. In the Courts of Common Pleas, however, it was held that this claim, or lien, was subordinate to the defendant's right of offset. This same rule obtained in the English Chancery Courts, while the Court of King's Bench held that the attorney's lien was superior to the defendant's right to such set-off. *Hull* v. *Ody*, 2 B. & P., 28; *Ensden* v. *Darley*, 4 B. & P., 22; *Simpson* v. *Lamb*, 50 Eng. L. & E., 59; *Taylor* v. *Popham*, 15 Vesey, 541; *Rhodes*, *ex parte*, 15 Ves., 79.

Afterward, however, in the Courts of Common Pleas, the practice was changed, and the right of

the attorney against set-off has been secured by the adoption of the rule so long enforced in the Court of King's bench. *Simpson* v. *Lamb*, 50 Eng. L. & Eq., 59.

As before stated, in the American Courts the same difference of opinion and practice has obtained. In the Supreme Court of New York, at an early day, it was held that this lien would prevent one judgment from being set off against another in such a manner as to deprive the attorney of his costs. *Cole* v. *Grant*, 2 Caines, 105; *Dury* v. *Boyer*, 3 John., 247.

In the States of Maine, New Hampshire, Nebraska, Florida, and Kentucky, the right of set-off of the defendant is held to be subservient to the attorney's lien for fees or costs and disbursements, as may be. *Stratton* v. *Hussey*, 62 Maine, 288; *Currin* v. *Railroad*, 37 N. H., 223; *Johnson* v. *Ballard*, 44 Ind., 270; *Boyer* v. *Clark*, 3 Neb., 161; *Carter* v. *Davis* 8 Fla., 183.

On the contrary, the Courts of West Virginia, Vermont, Iowa, and Alabama maintain the right of set-off as superior to the attorney's lien. *Renick* v. *Luvington*, 16 W. Va., 378; *McDonald* v. *Smith*, 57 Vt., 502; *Tiffany* v. *Stewart*, 60 Iowa, 207; *Mosely* v. *Norman*, 74 Ala., 422.

We think the better and more equitable rule is the one that subordinates the right of set-off of independent judgments rendered in different suits, growing out of different causes of action, to the attor-

ney's lien or claim for services rendered in the particular suit; and we do not hesitate to adopt it as the rule of practice in this State. On this subject, and in elaboration of our views, we quote the language of Chancellor Walworth in *Dunkins* v. *Vandenburgh*, 1 Paige Ch., 624:

"The question in all these cases is, What is equitable and just between the parties and the attorney or solicitor? Where different claims arise in the course of the same suit, or in relation to the same matter, it is undoubtedly equitable and just that these equities should be arranged between the parties without reference to the solicitor's or attorney's lien. His lien is only on the clear balance due to his client after all these equities are settled. But when other claims, arising out of different transactions, and which could not have been a legal or equitable set-off in that suit, exist between the parties, the Court ought not to divest the lien of the attorney or solicitor which has already attached on the amount recovered for the costs of that particular litigation. When the solicitor has been at the labor and expense of prosecuting a suit, it is equitable and just that his costs should be paid out of that litigation."

Nor is § 3635 of the Code to be construed so as to militate against this view. By that section it is provided that "judgments of the same Court may be set off against each other on motion." But we hold that this section must be read as if it con-

tained the implied condition that this set-off will not be allowed in derogation of the attorney's lien for his services in prosecuting the suit and obtaining the particular judgment. We think this construction gives full force to this provision of the Code, and, at the same time, it preserves the equities of the parties interested. This was the view taken of a statute similar in character by the Supreme Court of New Hampshire in *Shapley* v. *Bellows*, 4 N. H., 347.

In the case at bar, an order will be entered allowing the set-off, but subject to the lien of the solicitor, which will be declared by a proper order.

NUNNELLY v. WARNER IRON CO.

(*Nashville.* January 19, 1895.)

1. CONTRACTS. *Rules of construction.*

The rules and principles laid down for the exposition of contracts have for their sole object to do justice between the parties by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made. The intention is the governing principle of construction. In ascertaining the intention, the situation of the parties. the motives that led to the agreement, and the objects designed to be effected by it may all be looked to by the Court. (*Post*, *pp.* 291, 292.)

Case cited and approved: McNairy *v.* Thompson, 1 Sneed, 149.

2. CASE IN JUDGMENT. *Mining lease construed.*

Under a mining lease providing that the lessee shall pay, as royalty, one tenth of the output of the mines, delivered in shipping order, accessible to wagons, at the mine or shaft, or the cost price of mining and delivering same as stated, the lessor must accept riddled ore, according to the usage at date of lease, or the cost of mining and delivering "riddled ore" at the mine or shaft, and cannot exact ores, or the cost of mining and delivering ores, of a higher grade prepared by the use of modern and improved processes and machinery adopted at the lessee's expense after the date of the lease. (*Post*, *pp.* 283–294.)

FROM HICKMAN.

Appeal from Chancery Court of Hickman County.

A. J. ABERNATHY, Ch.

PITTS & MEEKS for Nunnelly.

STEGER, WASHINGTON & JACKSON, W. P. CLARK, and J. C. BRADFORD for Warner Iron Co.

M. B. HOWELL, Sp. J. The bill in this case was filed on September 7, 1891, by the devisees and legatees of L. H. Nunnelly, deceased, for the purpose of having construed by the Court a contract, made on December 11, 1880, between L. H. Nunnelly and L. S. Goodrich, whereby a tract of about fifty acres of land in Hickman County was leased by Nunnelly to Goodrich for the term of sixteen years. The clauses in the contract necessary to be noticed are as follows:

"It is hereby agreed between said parties that the party of the second part shall have the exclusive right to mine, dig, or in any other way mine, all the iron ore or other minerals, and the exclusive right to the use and benefit of all said ores, minerals, or products that may be upon or under said land, for the term of years specified.

"In consideration thereof, the party of the second part bind themselves to give to the party of the first part one tenth part of all the iron ore, or other products, or minerals, obtained from said land, delivered at the mine or shaft in shipping order and accessible to wagons, or pay for the same the cost price of mining and delivering as above stated. If royalty is required to be paid in iron ore or other minerals, delivery shall be in one hundred ton

lots, and to be moved from mines by the first party within thirty days after notification of delivery. If royalty is paid in money, settlements to be made quarterly from certified statements."

Before any mining was done, Goodrich assigned the lease to the Warner Iron Company. This company opened mines and operated for several years, and then assigned its rights under the lease to the Southern Iron Company. This latter company was in possession and operating at the date of the filing of the bill.

At the time the lease was made, the Warner Iron Company was erecting a blast furnace at a point twelve or fourteen miles from the leased land, on the line of a railroad then under construction, which was soon after extended near the land and beyond it about twenty miles. At that point was located Ætna furnace, afterwards bought by the Southern Iron Company. Meantime, a third furnace, called the Goodrich or Bird's Creek, had been constructed by the S. C. Company near the leased tract, which was also bought and operated by said company.

The Warner Iron Company also bought a tract of about one thousand acres of mineral land adjoining the leased premises, and they mined the ore from said tract, and from the leased land, which was used in operating their furnaces.

The first mining was done in part by contract, complainant, W. S. Nunnelly, being one of the con-

tractors. The compensation paid for mining was about $1.55 per ton for the first 1,000 tons; $1.40 per ton for the next 2,000 tons; and $1.30 per ton for the residue mined, and 20 cents per ton additional for hauling to the railroad station. On the ore so mined the company paid royalty of 15½, 14, and 13 cents, respectively, the mining being more expensive at first because of the amount of "dead work" required.

This exclusive contract mining continued only a short time, and thereafter mining was mainly carried on by the company itself, though a portion of the ore was still procured by contract. After taking the mining operations into their own hands, the Warner Iron Company, through its agent, Goodrich, stated and claimed that the cost of mining and delivery did not exceed one dollar per ton, on which the royalty would be one tenth, or ten cents, per ton, and this royalty was accepted with the understanding that if the actual cost was more than one dollar per ton, the royalty should be proportionately increased.

The mining was for some time carried on by digging out the ore from horizontal cuts into the side of the hill or ridge, loading on wagons with shovels, and hauling the ore away from the opening of the mine or shaft. The mass was then thrown upon riddles, or sifted to free it from dirt, the larger pieces broken up with sledges, the stones picked out by hand, and the ore thus obtained, more

or less contaminated with earth and stones, was weighed, and this weight accepted as showing the quantity of ore delivered.

Afterwards, the Warner Iron Company built a tramway from the railroad into the mines, and removed the ore by tram cars; and they constructed machinery whereby the ore was freed from stones and washed and the "shot ore" preserved, the iron material comparatively free from impurities being thus obtained. The first washing plant was comparatively crude; the second was elaborate, and seems to have been expensive. After the second washing plant had been constructed, the complainants demanded that they be paid their royalty in one tenth of the ore thus cleaned and washed.

This demand was refused, on the ground that they were not entitled to the washed ore, and that this was not contemplated in the contract; but it was admitted that they were entitled to screened or riddled ore.

The complainants then demanded that the company make a full statement of its expenditures in erecting its mining plant and machinery; in preparing to conduct, and in conducting, the water to the washer, including the cost of dams, pipes, etc.; the amount of "dead work" done; the cost of excavating and grading for tramway tracks; and any and all other expense incurred in building and maintaining the washing and cleaning plant, in order that they might learn in this manner the actual cost of mining and deliv-

ering the ore ready for the furnace. Various interviews were had between complainants and their attorneys, on the one part, and the company's agents on the other, but no conclusion was reached, and no statement of the kind demanded was furnished, the company's officers stating that the cost of mining did not exceed one dollar per ton, and paying royalty on that basis.

The complainants insist that the only proper mode of determining the cost of mining, and thus ascertaining the royalty due to them in money, is to take the entire product of the mine since it has been operated; then to estimate, as part of the cost of the work, the interest on the original investment by the company in the purchase of machinery of all kinds used in connection with said plant; the expense of putting same down and in condition for operation; the wear and tear of the same; the actual cost of any machinery or works that have become worn out or worthless, including dams, water-pipes, pumps, engines, cars, tools, and appliances, together with the expenses of operation and labor, and amounts paid for fuel and repairs—in short, aggregating every element of cost or expense incurred in the erection and operation of said mining plant and machinery, and dividing such aggregate by the number of tons of ore produced. They admit that in this estimate nothing is included on account of permanent investment in the plant, wear and tear of machinery, or the cost of dead work, and they claim that these are necessary

elements in the cost, as the work could not have been done without them, and, but for the purposes of the work, they are worthless. The complainants pray for an accounting on this basis.

The defendants admit the material facts charged in the bill with regard to the contract and the mode of mining the ore, and add that, prior to the death of L. H. Nunnelly, and up to about October 15, 1884 (Mr. Nunnelly having died in 1885), the ore was obtained by picks and shovels, and was riddled and screened; and that the royalty, in full, to the date named, was paid. No more mining was then done until November, 1887, but under that provision in the lease contract to the effect that the lease might be kept alive by paying royalty, the company paid to complainant, W. S. Nunnelly, $2,000—$1,000 on February 18, 1886, and $1,000 on January 25, 1887.

On March 29, 1888, W. S. Nunnelly wrote a letter to J. C. Warner, saying that he and Mr. Meeks considered the Goodrich lease forfeited, but, because the company had paid more money than it got ore, they were willing that the company should continue to mine on the leased land until the ore mined should amount to the money advanced. He further said, that they insisted that the company keep the shovel at work on the land till the requisite amount of ore was obtained, and on this amount of ore they would accept ten cents per ton for royalty, if Mr. Warner would say that was one tenth the

value of the ore per ton. He added that they were willing to make a new contract, but not to reinstate the former one.

It does not appear that any other contract was made, nor that the contract was treated as abrogated. On the contrary, all subsequent dealings were upon the basis of the Goodrich lease.

The defendants further say, that, after operating the leased mines for a time, it was found that the furnace could not be profitably run, amongst other things, on account of the cost and small output of ore; that the Warner Iron Company bought a tract of mineral land adjoining the leased premises, and provided itself with machinery, such as steam shovel and crusher; that this machinery was put up on its own land, and, during the time when mining ceased on the leased land, it was continued on their own property; that the defendant company also put up an elaborate and costly plant, whereby the ores, after they had been mined, could be properly prepared for smelting. Before the erection of this machinery, when the ore had been delivered by the contract miner, and the quantity determined for purposes of his charges and royalty, the mass had been burned or calcined in order to remove earth and stones. The new method was in the place of calcining, and further enabled the company to save the very small particles, called "shot ore," which had gone through the riddles and screens and been lost; that, under the pick and shovel and screening method of mining, the

only elements of cost were those created by digging, screening, and placing the ore so as to be accessible to wagons at the mine or shaft, and that the machinery for washing had no more to do with the mining, or its cost, than had the old method of calcining. The defendants further claim that the lessors have been paid the full cost of mining, and have received royalty for every ton of ore taken from their land.

The Chancellor decreed that the complainants were entitled, under the terms of the lease contract, to one tenth of the ore mined upon the leased land by the defendants, in shipping order, accessible to wagons, or to one tenth of the cost thereof; that ore was in shipping order when mined and riddled or screened, and at a point where it could be reached and hauled away by wagons; that the cost of such ore did not exceed one dollar per ton, and that complainants were not entitled to have considered the cost of the machinery used by the defendants, but only the cost of the riddled ore; and the complainants having mined and taken some ore from the leased land, and the amounts mined by defendants not having been determined, nor how much had been paid to complainants by defendants for ore mined on the leased land, a reference was ordered for an account to be taken by the Clerk and Master to ascertain how much ore had been mined by the defendants, and what amounts of money had been paid by them; how much ore the complainants had taken from the land since the date of the

lease; and, treating the cost of mining at one dollar per ton, the amount due from one party to the other.

From this decree complainants have appealed, and assigned error.

The first assignment is that the Court erred in restricting complainants to the cost of "riddled ore," or that mined by hand and screened in the manner prevailing at the beginning of the lease, and not allowing, as the basis of actual cost, the expense incurred in mining and delivering the ore in shipping order by the processes actually adopted by the defendants for putting the ore in that condition. In other words, complainants assign as error that the Chancellor did not allow the cost of the ore, washed, cleaned, and ready for delivery to the blast furnace, after having passed through the treatment by the machinery used for that purpose, as the basis of ascertaining the royalty due to the complainants.

The second error assigned was that the Court decreed that the cost of mining by hand did not exceed one dollar per ton.

"The rules and principles laid down for the exposition of contracts have for their sole object 'to do justice between the parties, by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made.' The intention is the governing principle of construction. In ascertaining the intention,

the situation of the parties, the motives that led to the agreement, and the objects designed to be effected by it may all be looked to by the Court." *McNairy* v. *Thompson*, 1 Sneed, 149.

The contract made between L. H. Nunnelly and others and L. S. Goodrich, on December 11, 1880, gave to Goodrich the exclusive right to mine, dig, or in any other way mine, all the iron ore or other minerals, and the exclusive right to the use and benefit of all said ores, minerals, or products that might be upon or under said land for sixteen years. As payment for such ores or minerals, Goodrich obligated himself to give to the lessors one tenth part of all the iron ore or other products or minerals obtained from said land, delivered at the mine or shaft in shipping order and accessible to wagons, or to pay the cost price of mining and delivery as above stated. It was further provided that, if the royalty should be required to be paid in iron ore or other minerals, delivery should be made in 100-ton lots, to be moved from the mines by the lessors within thirty days after notification of delivery.

It is evident that the parties, in making these stipulations, contemplated the delivery of, or the payment of royalty upon, ore at the mouth or opening of the mine in shipping order. It is further evident that, by the words "in shipping order," was meant that the ore should be reasonably free from earth, stones, or gravel, and such other impurities as could be readily found and removed. That this

construction was put upon the meaning of the contract up to the time of the erection of the washers, is shown by the fact that ore so prepared was hauled to the railroad station, the hauling paid for separately, the ore weighed, and the royalty per ton fixed by the weight. The further preparation of the ore for the furnace was solely the business of the company.

The fact that the defendants, assignees of Goodrich, the first lessee, adopted modern and improved methods of lifting and removing the ores cannot enlarge or affect the rights of the lessors. Whatever might be the increased facility or expedition with which the ores were mined by machinery over the hand digging modes, the right continued in the lessors to have one tenth of the ore at the mine or shaft in shipping order, or one tenth of the cost of placing it in that condition at that point. If the lessees were able to mine a larger quantity at a diminished cost, the lessors would receive a larger sum in royalty during a given time.

The processes used by the lessees for more effectually cleansing the ores and making them ready to go into the furnace, had no connection with the mining and delivering at the mine in shipping order, and, therefore, the expense thus incurred ought not to enter into the cost of mining. We are, therefore, of opinion that the first assignment of error should be overruled, and the decree of the Chancellor, in this respect, affirmed.

The testimony in the record does not clearly show what was the exact cost of mining ore from the leased land, after the resumption of operations in November, 1887. It is stated, by Mr. McNeilly, who was the secretary of the Southern Iron Company, that settlements were had, in full, with Mr. L. H. Nunnelly, the original lessor, for all ore mined prior to about October 15, 1884, when the work ceased. The weight of the evidence is in favor of the conclusion that, after the mines had been first opened, the cost of mining ore was not, at any time, in excess of one dollar per ton. We are, therefore, of opinion that the second assignment of error is not well taken, and that the decree of the Chancellor, in this respect, also, should be affirmed.

The cause will be remanded to the Chancery Court of Hickman County for the taking of the account ordered by the Chancellor. The complainants will pay the costs of the appeal. The costs of the Court below will be paid as the Chancellor may direct.

GRUNDY COUNTY *v.* TENNESSEE COAL, ETC., CO.

(*Nashville.* January 19, 1895.)

1. ASSIGNMENTS OF ERROR. *Insufficient, when.*

Assignments of error are insufficient that do not specifically point out the errors complained of. Three examples of insufficient assignments will be found in the opinion in this case. (*Post, pp. 298, 303, 323–327.*)

2. BACK TAXES. *Statutes authorizing assessment of, constitutional.*

The constitutionality of our statutes authorizing assessment and collection of back taxes reaffirmed. (*Post, p. 304.*)

Acts cited: Acts 1879, Ch. 79; Acts 1883, Ch. 181; Acts 1885, Ch. 23.

Code cited: §§ 664–668 (M. & V.).

Cases cited and approved: Wilson *v.* Benton, 11 Lea, 51, 56; Street Railroad *v.* Morrow, 87 Tenn., 420; Shelby County *v.* Railroad, 16 Lea, 401; Railroad *v.* Lauderdale County, 16 Lea, 688; State *v.* Railroad, 14 Lea, 56; Iron Co. *v.* Pace, 89 Tenn., 707.

3. SAME. *Evidence requisite in suit for.*

In suit for assessed back taxes, the assessment, under our statutes, is conclusive as to the valuation put upon the property, but not as to the right of the State or county to assess and collect the tax. Revaluation can be had only by appeal from the assessment to the Judge or Chairman of the County Court, and the taxpayer must show such appeal affirmatively. (*Post, pp. 304–307.*)

Code construed: § 664 (M. & V.).

Cases cited and approved: Franklin County *v.* Railroad, 12 Lea, 528; Shelby County *v.* Railroad, 16 Lea, 413; Railroad *v.* Lauderdale County, 16 Lea, 692; Knight, *ex parte*, 3 Lea, 401; 121 U. S., 535.

4. SAME. *Suit for, when brought.*

Suit for back taxes, where the right to assess and collect the tax is disputed, may be brought before a Justice of the Peace, as the Act provides, or in the Chancery Court. (*Post, p. 305.*)

Case cited and approved: State *v.* Railroad, 14 Lea, 56.

5. SAME. *Assessment valid, when.*

An assessment of back taxes, made by the proper officer upon legal notice and hearing, and written out in proper form and signed, is valid, although the Assessor may have failed to enter it upon record as prescribed by law. (*Post, p. 307.*)

Code construed: § 668 (M. & V.).

Case cited and approved: Wilson *v.* Benton, 11 Lea, 55.

6. CORPORATIONS. *Domicile.*

The domicile for purposes of taxation of a domestic corporation is, in the absence of other controlling charter or statutory provision, at the place fixed for the regular meetings of the stockholders, although its directors may meet, its officers reside, and much of its business be transacted at other places in and out of the State, where it likewise had offices. (*Post, pp. 307–309.*)

7. SAME. *Situs for taxation of intangible personality.*

The owner's domicile is the situs for taxation of the intangible personal property, such as money on deposit, notes, accounts, etc., belonging to a domestic corporation, wherever same may be situated or created, where the statutes have not fixed a different situs. (*Post, pp. 309–318.*)

Cases cited and approved: Mayor *v.* Alexander, 10 Lea, 477; Mayor *v.* Thomas, 5 Cold., 607; Railroad *v.* Morrow, 87 Tenn., 434; Conner v. Apperson, 14 Lea, 588; 104 U. S., 592; 100 U. S., 491; 56 Am. Dec., 529.

8. SAME. *Same.*

Our assessment laws have not fixed a situs, different from the domicile of the owner, for the taxation of the intangible personal property of domestic corporations. (*Post, pp. 318–322.*)

Acts construed: Acts 1889, Ch. 96, Secs. 4, 5, 13, 14; Acts 1890 (Ex. Sess.), Ch. 29, Sec. 26; Acts 1891 (Ex. Sess.), Ch. 26, Sec. 8.

9. TAX ASSESSMENTS. *Not void by reason of Assessor's interest.*

A tax assessment, or the statute authorizing it, is not void by reason of the fact that the compensation of the Assessor is fixed in proportion to the amount of the taxes assessed, collected, and paid over. The Tax Assessor is not the Judge of any Court within the meaning of that provision of the State Constitution forbidding Judges to preside in causes where they may be interested. The "due process" clause of the Four-

teenth Amendment of the Federal Constitution is not violated by such statute or assessment. (*Post, pp. 323–327.*)

Constitutions construed: Federal Constitution, Fourteenth Amendment; State Constitution, Art. VI., § 11.

Act construed: Acts 1890 (Ex. Sess.), Ch. 30, Sec. 1.

10. JUDGMENT. *Rendered by disqualified Judge valid unless objection was made.*

A judgment is valid, though rendered by a Judge who was disqualified by interest, unless objection was taken on account of such disqualification. (*Post, pp. 325, 326.*)

Cases cited and approved: Holmes *v.* Eason, 8 Lea, 754; Posey *v.* Eaton, 9 Lea, 500.

11. ASSESSMENT. *Method applied to corporations approved.*

The Court says: "The manner adopted by the Acts of Tennessee to arrive at the taxable value of the property of a corporation by taking into account its stock and bonded debt, has been approved as legal by the Supreme Court of the United States in the Railroad Tax Cases, 92 U. S., 604, and is neither arbitrary nor double taxation." (*Post, p. 327.*)

FROM GRUNDY.

Appeal from Chancery Court of Grundy County. T. M. McCONNELL, Ch.

GRANBERY & MARKS, L. V. WOODLEE, and T. C. LIND for Grundy County.

SMITH & DICKINSON, STEGER, WASHINGTON & JACKSON for Tennessee Coal, etc., Co.

WILKES, J. This bill was filed August 7, 1894, in the Chancery Court of Grundy County, to col-

lect certain taxes assessed for county purposes by the Trustee as back tax collector for the years 1891, 1892, and 1893. The bill was demurred to, and the demurrer was overruled, but no errors are assigned on that account. An answer and cross bill were filed, and the latter was answered, and proof was taken. Upon the hearing, the Chancellor decreed that complainant was entitled to the relief sought, and gave judgment in favor of complainant against appellant for the taxes as assessed against it and as shown in the bill, in the sum of $25,947.75, with interest from June 5, 1894—$583.82—making together the sum of $26,531.57, and for all costs. He dismissed the cross bill and overruled the demurrer. To all of this appellant excepted, and prayed an appeal, which was granted.

The errors assigned are as follows:

1. The Chancellor erred in giving complainant judgment for all or any part of the taxes so assessed.

2. He erred in dismissing cross bill of appellant, and in not sustaining the same, and enjoining the complainant from collecting all or any part of the taxes so assessed.

3. He erred because he did not dismiss complainant's bill for the reason that the bill set up the validity of said assessment and the steps essential to its validity, and, among them, that notice had been given to defendant of said proposed assessment, and that said assessment was entered on

the assessment book, and became a record of the county, and that it was unappealed from and final, and because appellant denied all such allegations in the bill, and complainant did not prove the same; and there is no evidence to show that appellant was cited to appear before said assessor for the purpose of being assessed, and none that said assessment is unappealed from and final, and therefore complainant cannot recover in an action founded on proceedings in which he fails to show such jurisdictional facts.

4. The Chancellor erred in that he held that the property assessed was subject to taxation in Grundy County, Tenn., whereas, the bill alleged that the said property was in Grundy County, Tenn., in the respective years for which it was taxed, and the answer denied the same, and there was no proof whatever to sustain said allegation of the bill; but, on the contrary, the proof showed conclusively that the property was not in said county in the said years for which it was taxed.

5. He erred in not dismissing the bill for the reason that the bill alleged, and the proof showed, that certain property of the character back assessed for the years 1891, 1892, and 1893 had been already assessed by said county for said years respectively, and the taxes had been paid on the same by appellant; and the answer denied the property sought to be back assessed was in said county in said years, and there was no proof to show that appellant had

in said county in said years respectively, more property of the character of that back assessed than had been actually assessed by said county previously for said years respectively, to appellant upon which the taxes so assessed had been paid.

6. He erred because he, in effect, held that the domicile of appellant for the years 1891, 1892, and 1893 was in Grundy County, Tenn., and that, by virtue of this fact, all the cash, bills receivable, notes, and accounts, wheresoever situated, and outside of Grundy County, and whether in the State of Tennessee or not, were assessable for taxation in Grundy County; whereas, according to the true intent and legal effect of the assessment laws of the State of Tennessee which were in force for the assessment of property for said years respectively, all such property was, for said years, assessable and taxable in the several counties in the State where it was located, and not otherwise.

7. The Chancellor erred in holding, in effect, that Section 25, Chapter 105, Acts 1883, Sections 26, 71, and 72, of Chapter 96 of the Acts of 1889, and Section 19, Chapter 26, of Acts of 1891 (Extra Session), which were in force at the time said assessment for said years was made, were constitutional; whereas, the effect of said sections was to create a Court to try and decide causes, and make the Trustee *ex officio* the Judge to finally hear and determine the cause, and issue execution upon his judgment. The Trustee, under said Acts, was authorized to render a judg-

ment fixing the amount of the assessment, and this was such a judgment as authorized and sustained a distress warrant. Said Section 26 gives the Trustee a direct interest in the result of his judgment, proportioned to the amount of it. It is a violation of Article VI., Section 11, of the Constitution of Tennessee, that a Judge shall preside in the trial of any cause in the event of which he shall be interested. Said Acts are also in violation of the Fourteenth Amendment to the Constitution of the United States.

8. The Chancellor erred in that he did not hold that action of the Assessor was not final, and that, inasmuch as the right of Grundy County to assess the property which the Assessor endeavored to assess was denied by the answer, the Court could, and of right should, determine, regardless of the action of said Assessor, whether or not the said property was assessable for taxation in Grundy County, and because he did not hold that the said property was not so assessable for the reason that it was not located in Grundy County.

9. He erred in not sustaining the cross bill, on the grounds that said assessment was void, because the property so sought to be assessed was not located in Grundy County, and was not taxable therein.

10. The Chancellor erred in not dismissing the bill and in not sustaining the cross bill, because, under the law for the assessment of property, in force in Tennessee for said years, the said property sought to be assessed by Grundy County was assessable and

taxable in the several counties in Tennessee where it was respectively located, and because it was so assessed in said counties, as shown by the proof, and the taxes were paid thereon, and the assessment of the said property in these proceedings would subject appellant to double taxation on said property for said years.

11. The Chancellor erred in not holding that Section 13 of the Acts of 1889, and Section 8 of the Acts of the Extra Session of 1891 were unconstitutional, and that they conflict with Article XIV., Section 1, of the Federal Constitution, which forbids any State to deny to any person within its jurisdiction the equal protection of the law. The object of such constitutional provision is to secure equality and uniformity, and arbitrary or artificial rules for the estimation of values cannot be adopted, nor can artificial values be attached to property subject to taxation. The Acts under which the assessment in question was attempted authorize the property of a corporation owning property in more than one county to be assessed at more than its value. They authorize the Assessor to disregard the value of the property in his county, and make a valuation upon it for taxation which is arbitrary, artificial, and unjust. Said Acts discriminate in favor of individuals as against corporations, in that they fix a rate of taxation for the former that is higher and different from that applicable to the latter. Said Article XIV. secures to corporations, as well as individuals,

the equal protection of the law, and forbids unequal exactions of any kind, among them unequal taxation.

It is not necessary to notice specially the first and second assignments, as they are too general to come within the rule, and are disposed of in the general result of the ruling upon the other assignments. The third assignment is, in effect, that the necessary evidence is not before the Court to enable it to determine the validity of the assessment.

Under this assignment it becomes necessary to examine the several Acts under which the assessment was made, especially the Acts of 1879, Chapter 79, as amended by the Acts of 1883, Chapter 181, and Acts of 1885, Chapter 23. The authority to make such back tax assessments and the mode of proceeding are set out in these Acts. It is provided that—

First.—If the owner of the property admits the liability of the property to taxation as assessed, but disputes the amount of assessment, he may have a revaluation before the Judge or Chairman of the County Court at any time within one month, and, in such case, the Judge or Chairman may hear proof and fix the assessment or valuation, and the same shall be final. M. & V. Code, § 664.

Second.—If the owner denies the right to tax the property, but raises no question as to value, then the collector shall submit the facts to the Judge or Chairman of the County Court as to the county taxes, and, if directed by such Judge or Chairman,

he shall bring suit before a Justice of the Peace for the taxes without regard to the amount, and the matter shall be tried without delay, with right of appeal to each party, and a speedy trial shall be had. Code (M. & V.), § 664.

Third.—If both the amount and the right to tax are disputed, the owner shall have ten days to have a reassessment before the Judge or Chairman of the County Court as to county taxes, and, at the end of ten days, the collector shall proceed as provided in cases where the right to tax is alone questioned. Acts of 1879, Ch. 79; Code (M. & V.), §§ 666 and 667.

These Acts have been held to be constitutional. *Wilson* v. *Benton*, 11 Lea, 51, 56; *Railroad* v. *Morrow*, 3 Pickle, 420. And otherwise construed in *Shelby County* v. *Railroad*, 16 Lea, 401; *Chesapeake & Ohio Railroad Co.* v. *Lauderdale County*, 16 Lea, 688; *State* v. *Railroad Co.*, 14 Lea, 56; *Iron Co.* v. *Pace*, 5 Pickle, 707.

We think the proper construction of these Acts is that, in all contests over the valuation of the property, it is incumbent on the owner to have a reassessment made, and, in case he fail to do so, the assessment, so far as valuation is concerned, becomes final. But where the right to assess and tax is questioned, it is incumbent on the collector to bring suit to test this right, and upon the bringing of such suit all questions legitimately bearing upon the right to tax are open for contest and adjudication,

and this would include all questions not pertaining to valuation, the latter being concluded by the failure to apply for a reassessment. This suit, to determine the right to tax, may be brought before a Justice of the Peace as the Act provides, or it may be brought in the Chancery Court. *State* v. *Railroad*, 14 Lea, 56.

Under this holding, much of the controversy in this case, touching the effect to be given the assessment made by the collector, is eliminated, as the proceeding before the Assessor, if warranted by law, becomes conclusive and final so far as the valuation fixed by him upon the property is involved, unless the defendant had made an application to the County Judge, or Chairman of the County Court, for a revaluation, which was not done in this case. But while the proceeding is conclusive in the absence of such application to revalue, so far as the value of the property is concerned, it is not conclusive as to the right of the county to assess and collect the tax, and every matter involved in that right may be inquired into in this suit. M. & V. Code, § 664; Welty on Assessment, Sec. 137–8; Cooley on Taxation, p. 798; *Franklin County* v. *Railroad*, 12 Lea, 528; *Shelby County* v. *Railroad*, 16 Lea, 413; *Railroad Co.* v. *Lauderdale County*, 16 Lea, 692; *Knight, ex parte*, 3 Lea, 401; *Stanly* v. *Albany County*, 121 U. S., 535.

The bill in the cause charges that the assessment was made as provided by law, and sets it out ver-

batim. The answer admits that it was in form as set out in the bill; that it was written out and signed by the County Trustee on June 5, 1894. It then proceeds to deny the legality of the assessment, or its entry upon proper books, or that it became a county record, and denies that the statements made are true or based upon evidence, but were contrary to and against the evidence submitted to the Trustee. The answer then proceeds to set out in detail which of the recitals in the assessment are untrue, and says that evidence was furnished to the Trustee, showing the statements in the assessments to be untrue. It proceeds to deny the right of the county to assess the property, and that the assessment was legal, but it does not expressly deny that the assessment was made as charged, nor that it had notice that such assessment was to be and was in fact made. The proof shows that the assessment was made upon evidence furnished by the secretary of the company, and taken from the annual reports of the company, and that the secretary of the company, in his examination, set up fully the grounds upon which it was insisted there was no liability to the tax.

From these statements in the answer, as well as the proof, it is apparent that the company had notice of the assessment made by the Trustee, and contested before him the right to tax, as well as gave evidence upon which the value of the property was fixed by the Assessor, and that such proceedings were had as made the assessment complete and

final as to valuation, unless the company, under the law, saw proper to appeal to the Chairman of the County Court for a revaluation of the property. If such appeal or application to revalue was made, it is incumbent on the company to show such fact. Whether we treat the appeal as a matter of record or as a fact, it would devolve upon the company to show such appeal, and not upon the county to show a negative—that is, a fact that did not exist.

The action of the Assessor must be considered conclusive upon the question of value, but upon the right to reassess and tax, that was left open for further investigation when suit was brought by the county to enforce it. It does not appear that the collector kept a book upon which he entered his assessment, as prescribed by § 668 (M. & V.) Code, but his assessment was written out in detail, as hereafter shown, with great minuteness and detail of recital. This was held sufficient in *Wilson* v. *Benton*, 11 Lea, 55. The main object of the provision, Section 668, is to furnish a record by which the Assessor may settle with the County Court, and evidently is intended to furnish the basis for such settlement, as it must contain not only the assessment, but also statement of the taxes collected. The failure to enter the assessment, as soon as made, upon such book, does not in any way affect its validity as against the property owner.

In our view of this case, the first question to be decided is the domicile of the company. It appears

that the company has offices at Tracy City, Nashville, Cowan, South Pittsburg, Birmingham, New York, and, perhaps, other places; that the meetings of the board of directors are held in New York City, and the stockholders' meetings at Tracy City, Grundy County; that its president's and secretary's offices are at Nashville, and that its obligations are entered into, and its cash deposits are, mainly, at that place. The charter itself does not fix the domicile, or home office, but an amendment to the same, adopted July 16, 1889, provides that the biennial meetings of the stockholders shall be held at Tracy City. The by-laws in force in 1889, and up to April 10, 1893, provide that the company shall have offices at Tracy City, South Pittsburg, Nashville, Cowan, Pratt Mines, Ensley, Birmingham, New York, and such other places as the board may establish, and on April 10, 1893, this provision was so amended as to provide that the offices of the company shall be at Tracy City, and at such other places as the board of directors may establish. Under this proof, we think the domicile of the company must be held to be in Tracy City, Grundy County, Tennessee; that its primary governing and controlling power is exercised, under its charter as amended, at that place, and that it is so recognized by the company.

"The principal office or place of business of a corporation," says Desty on Taxation, Vol. I., p. 341, "is the residence of the corporation within the

meaning of the tax law in its provisions for taxation of the personal property of the company."

Welty on Assessments, p. 106, defines the residence of a corporation as follows: "The residence or domicile of a corporation has been defined to be where the governing power of the corporation is exercised; where those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business. In order to determine the legal residence of a corporation, reference must be had to the place where its will is declared and made known, and not to the place where its mandates are obeyed or the business or labor transacted or performed which it authorizes or requires. It will be seen that this, too, is a question of fact, to be determined by the Assessor as in the case of natural persons."

With these preliminary questions settled, we come to the manner and mode in which the assessment was made, and the property which was assessed. The assessment, as made by the Trustee, is in the following words:

"In the matter of the back assessment of the Tennessee Coal, Iron & Railroad Company for the years 1891, 1892, and 1893, I was motioned by L. V. Woodlee, back tax collector for Grundy County, Tenn., to back assess the above-named company for the above-named years, both upon omitted property

and inadequately assessed property. I issued notice, and had the same served upon the company, to appear before me, at my office at Altamont, Tenn., on May 10, 1894. Upon that day the company appeared, and requested a continuance to the fourteenth. On that day, after hearing some of the facts with reference to the matter, the company again requested a further continuance until May 29, and, on that day, I heard additional facts with reference to the company's property.

"I find that on January 10, 1891, the company's shares of stock amounted to $10,000,000—$9,000,000 common stock and $1,000,000 preferred stock. I find that the actual value of the common stock at that time was thirty-five cents on the dollar, and the preferred stock was worth par. I find that on January 10, 1891, the bonded indebtedness of the company was $5,187,844, and was worth at that date ninety cents on the dollar.

"On January 10, 1892, I find that the shares of stock of the company was $10,000,000—$9,000,000 common and $1,000,000 preferred. The value of the common stock was forty cents on the dollar, and the preferred stock was worth ninety cents. The bonded indebtedness of the company at that date was $5,189,453, and was worth ninety cents on the dollar.

"On the tenth of January, 1893, I find that the shares of stock of the company was $20,000,000 common and $1,000,000 preferred stock. The value

of the common stock was thirty-five cents on the dollar, and the value of the preferred stock was ninety cents on the dollar. The bonded debt was $9,198,428, and was worth ninety cents on the dollar.

"I find that the company has been paying taxes at an assessed value for the years 1891 and 1892, and on all of its properties everywhere, of less than $2,000,000, and for the year 1893 less than $2,500,000.

"I find that the company is unable to separate the value of the property in the various States and counties in which it owns property. I am satisfied from the proof that the intangible property which is assessable in Grundy County, Tennessee, is very valuable, but, owing to the lack of information, I am unable to estimate its value for taxation.

"I find that the home office of the company is in Grundy County, Tennessee, and that the company is chartered under the laws of the State of Tennessee.

"I find from the proof that the ownership of all the properties together make their values much greater than they would be if owned by various persons, but the exact value to be placed on this element I am unable to ascertain.

"I find that on January 10, 1891, the company had on hand, in Grundy County, Tennessee: (1) Cash, $100,162.68; (2) open accounts on good and solvent parties, $633,665.02; (3) general supplies, consisting of sundry materials, not otherwise assessed, $12,331.16.

"I find that on January 10, 1892, the company had on hand, in Grundy County, Tennessee: (1) Cash

and bills receivable, $146,294.12; (2) accounts on good and solvent parties, $617,531.82; (3) general supplies, consisting of sundry materials, not otherwise assessed, $14,329.81.

"I find that on January 10, 1893, the company had on hand, in Grundy County, Tennessee: (1) Bills receivable on hand, $53,463.12; (2) cash, $98,810.87; (3) accounts on good and solvent parties, $1,425,571.62; (4) general supplies, consisting of sundry materials, not otherwise assessed, $11,599.95.

"I therefore assess the Tennessee Coal, Iron & Railroad Company, a corporation chartered under the laws of the State of Tennessee, and having its principal office at Tracy City, Grundy County, Tennessee, upon the cash, open accounts, general supplies, consisting of sundry materials, not otherwise assessed for the year 1891, on a valuation of $714,505.86, and on the same character of property for the year 1892, on a valuation of $744,443.75, and for the year 1893, on the same character of property, on a valuation of $1,557,495.56. The amounts assessed under each of the above heads is above set out, and that is the property that is intended to be included in this assessment, after giving credits for each of the years by the amounts heretofore paid on. This is the only character of property intended to be embraced in this assessment and valued for assessment herein. Under the provisions of the Act of 1889, and the amendments thereto, providing for the assessment of properties of corporations, I em-

brace the foregoing items of assessment under the comprehensive term of "capital stock" of the Tennessee Coal, Iron & Railroad Company, in Grundy County, Tennessee, and not heretofore assessed, excluding therefrom all other property, except that specifically mentioned as being embraced therein.

"I hereby exclude from the assessment the State taxes, for the reason that I am informed that such taxes have heretofore been settled and compromised by the State and the company. As the result of the above statement, the total valuation of the above named property, which is embraced in this assessment as of January 10, 1891, is $714,505.86; January 10, 1892, $744,443.75; January 10, 1893, $1,557,495.56. And I hereby assess said company as above stated for the taxes for the years named. This June 4, 1894."

It appears from this assessment that the Trustee, treating Grundy County as the domicile of the company, proceeded to estimate all its cash, notes, bills receivable, and other property specifically mentioned as legally if not actually situated in Grundy County, and proceeded to assess it as so much of the property entering into the capital stock of the company, which the Trustee was of opinion had been omitted to be estimated in the regular assessment. The value of the capital stock and bonded indebtedness of the company were found by him to be largely in excess of what it had been assessed for taxes. In other words, the Trustee found that for 1891 the

capital stock and bonded indebtedness of the company had been estimated for taxation purposes at less than two millions of dollars, when its market value was over seven millions; that for 1892 it had been assessed on a valuation of less than two millions, when its market value was over nine millions, and in 1893 it had been assessed at two and one half millions, when its market value was more than sixteen millions.

The Trustee also found the items of cash, open accounts, and general supplies for 1891 to be $746,158.86, while it had been assessed on these accounts for only $31,653, leaving for reassessment for 1891, $714,505.86. For the year 1892, the items amounted to $778,155.75, while the assessment had been for only $33,712, leaving for reassessment for 1892, $744,443.75. For the year 1893, the items amounted to $1,589,445.56, while the assessment had been for only $31,950, leaving for reassessment for 1893, $1,557,495.56. And upon these amounts the reassessments were made for the respective years.

Passing the question of valuation, as having been conclusively settled by the proceeding before the Assessor, and the failure of the company to apply for a reassessment, we come to the real questions at issue in the case, Whether such intangible property as choses in action, including cash on deposit, notes, bills receivable, and open accounts, is liable to assessment and subject to taxation; and, if so, what is the location of such property for purposes of

taxation? We are not now dealing with tangible property, real or personal, but only such items as are embraced in this assessment as intangible, and which may be comprehensively embraced in the term choses in action, as contradistinguished from specific personal or real property. It appears that this company owns valuable property, real and personal, in nine counties in Tennessee, eight in the State of Alabama, one each in the States of Georgia and Mississippi, and also in New York and Louisiana, and that its choses in action grow out of its operations in these several localities. The company separates its property into different divisions, and the operations are shown upon its books by these divisions.

As an illustration of the status of the items, we take the assessment for 1891:

Cash and bills receivable on hand at main and branch offices	$ 45,526 85
In bank	54,635 83
Making an aggregate of	$100,162 68

Under the head of sundry debtors on open accounts:

Nashville office	$ 13,567 60
Tracy City division	40,672 12
Cowan division	49,935 62
South Pittsburg division	114,676 23
Birmingham division	77,727 79
Pratt Mines division	45,837 76
Ensley division	292,747 90
	$635,165 02
Less bad debt reserve fund (Ensley)	1,500 00
Total	$633,665 02

All of this was assessed as being on hand in Grundy County. Similar assessments were made for 1892 and 1893, the items in each instance being taken from the published balance sheets of the company, and embracing the operations of the different divisions in Tennessee and Alabama, the greater amounts being in the latter State. It has been for years, and is still, the policy of our revenue laws to tax all notes, duebills, negotiable paper, and accounts upon solvent persons or parties believed to be solvent, and all other assets, including cash on hand or on deposit or invested in any manner in this State or elsewhere, and the Acts in force for the years for which these taxes were assessed so expressly provide. Cash on deposit is, in legal effect, only a chose in action—that is, an indebtedness of the bank to the depositor, who has no interest in any specific money by virtue of his deposit, but only a right to check generally against the funds in the bank. *Marsh* v. *The Bank*, 34 Barb., 298; *Sneed* v. *The Seaman's Bank*, 37 Barb., 129; 2 Am. & Eng. Ency. Law, p. 93, note 94; Welty on Assessment, Sec. 39, p. 64; *Ib.*, Sec. 45, p. 99.

The rule of taxing choses in action applies as well to corporations as to individuals, and it was never intended to exempt corporations from taxation because of their extended operations, while individuals, operating in a limited territory, are to be taxed upon this species of property. It is difficult to see, under defendant's contention, how such choses in action, origi-

nating out of operations in other States, can be reached for taxation at all, as there is no location of such corporate assets in this State, unless it be at the legal domicile of the corporation. So, also, the same remark applies to choses in action arising out of operations in counties in the State other than that of the corporate domicile. These choses in action, when they come into existence by the sales of material, are not kept separate and distinct from each other, and in the separate divisions, when created, but they go into a general fund, to be applied to dividends or expenses generally of the company, without regard to the division where such choses in action and expenses originate or are incurred. The notes, duebills, accounts, and cash deposited, lose their local status when they are created, and have then only a general status dependent on the domicile of the corporation.

It is a general rule, recognized not only in this but in other States and in the United States Courts, that the situs of intangible personal property, such as choses in action, notes, accounts, etc., for the purpose of taxation, in absence of any statute fixing a different situs, is at the domicile of the owner. *Mayor* v. *Alexander*, 10 Lea, 477; *Mayor* v. *Thomas*, 5 Cold., 607; *Bonaparte* v. *Baltimore*, 104 U. S., 592; *Kirtland* v. *Hotchkiss*, 100 U. S., 491–499; *Cannon* v. *Apperson*, 14 Lea, 588; 56 Am. Dec., 529, 530, 531, notes.

If the Acts of the Legislature fail to fix the

location of such property for taxation, it is evident that it must be held to be the domicile of the owner, in cases of corporations as well as of individuals or executors. 56 Am. Dec., 529, 530, 531; Welty on Assessments, Sec. 39, pp. 64, 65; Sec. 44, p. 84; Sec. 45, p. 99; Sec. 46, p. 103; *Street Railroad Co.* v. *Morrow*, 3 Pick., 434.

Unless we hold such intangible property to be legally situated and taxable at the domicile of the corporation where the statute does not prescribe a different situs, the effect will necessarily be to permit such as may be in other States, or even counties, to escape taxation altogether.

It cannot be held that the Assessor must hunt down and locate each note and duebill, and the cash that may, for convenience, be located in different banks, and, even if he must, still he would be stopped in his search by the lines of the State, and, so far as county revenue is concerned, by the lines of each county. Under such a construction, the company could place its notes and books of account in one of its offices in preference to another, or remove them to its New York or Birmingham office, and escape taxation altogether, as the Assessor could never locate this most difficult of all property by its actual situs.

Let us examine for a moment the several Acts which are claimed to bear upon this question of situs. The particular statutes under which the Trustee of Grundy County acted in making the assessment

in question are: Acts of 1889, Chapter 96, Section 13, and as amended by Acts of 1890 (Extra Session), Chapter 29, Section 26, and Acts of 1891 (Extra Session), Chapter 26, Section 8.

Subsection four of the Act of 1889, Section 4, prescribes that property shall be assessed in the district or ward in which it lies or is known to be at the time of assessment. Special provisions are made regarding the taxation of street railroad companies, and subsection five relates to property of corporations and companies that lie wholly or mainly or whose chief business is within some incorporated city, taxing district, or town. We are of opinion that, under this Act, Section 4, real estate generally must be assessed where it lies, and tangible personal property where it is known to be at the time of assessment, but the location of choses in action is not fixed by express terms. Welty on Assessments, Sec. 39, note 5. See also Sec. 30, page 42.

Sections 13 and 14 of the same Act prescribe the manner in which the taxable value of the corporate property shall be ascertained, and Section 8 of the Acts of 1891 (Extra Session) prescribes the manner in which such values shall be apportioned in different localities.

If we concede that subsection four, Acts of 1889, was intended to apply to choses in action of a corporation, it cannot be construed to locate them elsewhere than at the domicile of the corporation. This domicile is the legal situs of such property, and is

the district or ward in which such property lies, or is known to be, in the sense of the statute. It cannot be where the debtor resides, nor where the notes or book of accounts may, for the time being, be deposited, but it is where the owner resides—that is, where the corporation has its domicile. Tangible personal property, or real estate, may lie or be found elsewhere, but choses in action lie and are known to be only at the domicile.

If we hold that subsection five applies, and that Tracy City is such city, taxing district, or town as the section contemplates, then the same result follows, as this property, under our view, lies wholly in such town or city, and its chief business is there, under our construction of the term chief business. If Tracy City be not held to be such incorporated town as the Act contemplates, then subsection five has no application in this case whatever. Moreover, Tracy City is not an incorporated town, city, or taxing district.

The material part of Section 8 of the Act of 1891 reads as follows: "All incorporated companies assessable under Sections 13 and 14 of the Act owning property in this and another State, or in one or more counties in this State, shall pay an *ad valorem* tax upon the full value of its capital stock (including its franchises, easements, and incorporeal rights and corporate property), which shall in no case be held or deemed to be less than the actual value of its bonded indebtedness; and the value of

the property of the corporation in the county where located shall not be assessed at less than the relative value of the property of the corporation as capitalized and bonded in the county where located bears to the entire value of the property of the corporation as capitalized and bonded," etc.

This Act does not attempt to fix the location of either tangible or intangible property for purposes of taxation, or to determine what property is located in any given county, but merely prescribes the method by which value is to be ascertained of whatever property may be in such county. The location of the property, tangible or intangible, being otherwise fixed, this section prescribes the rule to estimate and determine its value in each locality.

It is well to note that these several Acts do not proceed upon the idea of assessing the shares of stock of a corporation, and taxing them as such, but such stock, as well as the bonded indebtedness of the company, must be looked to in order to arrive at the value of the corporate property, including the franchises, easements, corporeal property, and incorporeal rights, all going to make up the value of its capital stock.

Two considerations are had: (1) That the entire property of the company shall be assessed and taxed upon a basis to be arrived at by taking into consideration its capital stock and bonded indebtedness; and (2) that, in each county where its property is located, the valuation shall be made in proportion to

the relative value which the property in that county bears to the value of the entire property. But none of these Acts fix in direct terms where the intangible, incorporeal property which enters into the value of the capital stock or corporate assets, such as notes and other choses in action, shall have their location for purposes of taxation, and the proper construction of these is that intangible property is assessable at the domicile.

We think it very apparent that these items of intangible property, embraced in this assessment by the Trustee, have not been elsewhere assessed to the company, and it is pertinent to remark that, if it is improper to assess them at the domicile of the company, it becomes impracticable to assess them anywhere else. Certainly, there is no warrant to assess them at Nashville or any of the other offices of the company, or in any one of its other divisions, and the location of such property, whether under these Acts or the general laws of the State, must be at the domicile of the company. It is evident the Assessor followed this view as to the construction of these Acts, as he assessed the tangible personal property, consisting of materials, etc., on hand in Grundy County, where it was known to be, but ignored such materials and tangible property as was known to be in the Cowan and other divisions outside of Grundy County, while he assessed the whole of the intangible property in that county.

The logic of appellant's contention is to draw all

personal property, both tangible and intangible, to Grundy County for purposes of taxation, as we consider that the main office, but we do not think this question arises in this case, as only intangible property is sought to be assessed, except that part of the tangible property actually in Grundy County.

But it is said "the Acts under which the assessment in question was attempted are unconstitutional, in this, that their effect was to create a Court to try and decide causes, and make the Trustee *ex officio* the Judge to finally hear and determine the cause, and issue execution upon his judgment. The Trustee, under said Acts, was authorized to render a decree fixing the amount of the assessment, and this was such a judgment as authorized and sustained a distress warrant.

"Said Acts give the Trustee a direct interest in the result of his judgment, proportioned to the amount of it, as his compensation is fixed by the amount of taxes assessed and collected and paid over.

"It is a violation of Article VI., Section 11, of the Constitution of Tennessee that any Judge shall preside in the trial of any case in the event of which he shall be interested. Said Acts are also in violation of the Fourteenth Amendment to the Constitution of the United States, because they authorize the taking of property of appellant 'without due process of law.' Property of a citizen taken from him by virtue of a judgment rendered under such circumstances, is obtained 'without due process

of law,' within the meaning of the Fourteenth Amendment to the Federal Constitution, and such a judgment is in violation of Article VI., Section 11, of the State Constitution, which says: 'No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any inferior Court, except by consent of all the parties.'

"It is insisted that the effect of these statutes is to create a Court and invest the Trustee with judicial powers. They clothe him with authority to hear and determine causes, and give to his conclusion all the force and effect of a judgment, upon which a distress warrant, the most summary of all executions, may issue. While the Trustee, exercising the powers conferred by these statutes, may not be, *eo nomine*, a judge, yet he is acting in a *quasi* judicial capacity. He summons witnesses, hears and weighs evidence, and renders a decision upon it, which becomes the basis of an execution. Certainly a person who performs such high and responsible duties as those confided to the Trustee under the assessment Acts of Tennessee, should not have a direct pecuniary interest in the result of his decision. Yet he receives a compensation proportionate to the amount of his judgment."

If this position be tenable and the result as claimed, then it is evident that all our laws in regard to the assessment of property for purposes of taxation, are and have been for a series of years, unconstitutional, for they all give to the Assessor a certain per cent. upon property assessed by him for his services, and his compensation is thus made to depend upon the amount of property assessed and the valuation placed upon it by him. See the last Act of Extra Session 1890, Chapter 30, Section 1. A similar rule prevails in regard to Trustees in assessing picked up taxes.

Whatever may be said of the unwise policy of providing that the Assessors shall receive a compensation regulated by the amount and value of the property assessed by them, it is evident that it has been adopted in our legislation, and must stand, unless it is inhibited by the constitutional provisions. While the Assessor, in the discharge of his duty, exercises a judicial or *quasi* judicial function, still he is not a Judge of a Supreme or Inferior Court in the sense of the constitutional provision, and that provision cannot be held to apply to such offices, because not in the letter of the inhibition. All objections of this character would be remedied by adopting a different mode or rule by which to regulate the compensation, but, inasmuch as the Legislature has sanctioned this mode, and it is not contrary to the provisions of the Constitution, this Court cannot but sustain it. Besides, it does not appear that any

objection was made before the Trustee because of his disqualification on account of interest, and, under our authorities, the objection for want of qualification has been waived. *Holmes* v. *Eason*, 8 Lea, 754; *Posey* v. *Eaton*, 9 Lea, 500.

It is said the Acts under which the assessment was made, are contrary to the provisions of Article XIV., Section 1, of the Federal Constitution, which forbids any State to deny, to any person within its jurisdiction, the equal protection of the law, and it is contended, in a general way, that these Acts discriminate in favor of individuals as against corporations, in that they fix a rate of taxation for the former that is higher and different from that applicable to the latter. No doubt counsel meant to say exactly the reverse of this, to wit: that the rate fixed for corporations was higher than that fixed for individuals, and we so treat it. But the assignment does not point out how, or in what way or sense, the rate is different, nor are we able to see how the rate is made higher, even, though, from the nature of the case, the manner of assessing is necessarily somewhat different. The exception is not specific, as required by Rule 29, 1 Pickle, 757, and does not point out definitely the errors complained of. But, if we hold that this assignment is meant to raise the question of the disqualification of the Assessor to make the assessment, because of interest in him, and that a judgment rendered by him is obtained without "due process of law," within the

meaning of the Fourteenth Amendment to the Federal Constitution, still, in the view we have taken, the assignment in not well made. The manner adopted by the Acts of Tennessee to arrive at the taxable value of the property of a corporation by taking into account its stock and bonded debt, has been approved as legal by the Supreme Court of the United States in the Railroad Tax Cases, 92 U. S., 604, and it is neither arbitrary nor double taxation. Welty on Assessments, pp. 250, 251. See, also, Federal Reporter, Vol. 64, p. 9. All other assignments not specifically treated herein are without merit, and are overruled.

The decree of the Chancellor is affirmed with costs.

PEERY *v.* PEERY.

(*Nashville.* January 21, 1895.)

1. EVIDENCE. *Testator's declarations.*

Testator's statement, made some weeks before his death, and six months after the execution of his will, that he had to make the will as he did to have peace at home, is admissible to show his mental condition at the time of its execution, but not to show undue influence. (*Post, pp. 330, 331.*)

Cases cited: Beadles *v.* Alexander, 9 Bax., 604; Linch *v.* Linch, 1 Lea, 526; Maxwell *v.* Hill, 89 Tenn., 584; 31 Am. St. Rep., 690; 9 Am. Dec.. 632.

2. SAME. *Same.*

Testator's statement, made six months after the execution of his will, that he had to make the will as he did to have peace at home, is not competent upon the issue of undue influence, in the absence of some other evidence thereof, and then it is admissible only to show the effect, not the substantive fact, of such influence. (*Post, pp. 342, 343.*)

Case cited: 31 Am. St. Rep., 690.

3. SAME. *Same.*

In the contest of a will on the ground of undue influence, evidence that sometime after its execution the testator spoke of its provisions to a subscribing witness, and expressed satisfaction and explained the apparently unequal division of his property, and thereafter permitted the will to stand, with the fullest opportunity to destroy it or make another, is a strong and convincing indication that it was his will and according to his desires. (*Post, p. 343.*)

Cases cited: 49 Am. Dec., 626; 11 Am. Dec., 648.

4. SAME. *Competent upon one of several issues.*

Evidence admissible upon one issue in a case, but incompetent as to others, cannot be excluded upon objection. Nor can the Court be put in error by failing in his charge to limit the effect of such evidence to any particular issue, in the absence of a special request on that point. (*Post, pp. 330–332.*)

Peery *v.* Peery.

5. WILL. *Verdict of jury setting aside.*

The verdict of a jury in cases of contested wills has the same force and effect as in other civil cases. The Court finds no evidence in this case to sustain verdict setting will aside. (*Post, pp. 332–338.*)

6. WILLS. *Undue influence defined.*

Upon contest of will for undue influence, the question is "whether the will is the will of the testator, or that of another." It is not influence that vitiates, but undue influence; and it must go to the extent of depriving the testator of his free agency, and amount to moral coercion which he is unable to resist. Each case must rest upon its own circumstances, and be controlled, to some extent, by the mental characteristics, and the mental and physical condition, of the testator, and, in a subordinate degree, by the mental strength and will power of the dominating influence, as well as the opportunities for its exercise. (*Post, p. 338.*)

Cases cited and approved: McClure *v.* McClure, 86 Tenn., 176; Nailing *v.* Nailing, 2 Sneed, 630; Wisener *v.* Maupin, 2 Bax., 364.

7. SAME. *Exercise of undue influence by wife.*

The legitimate exercise by the wife of that influence which results from love and affection in shaping the provisions of her husband's will in favor of herself and children does not vitiate the will. Undue influence by the wife cannot be presumed from the fact that she had opportunities and temptations to exert it, but must be affirmatively shown. She has the right to advise with and counsel her husband to make such will as she deems just and proper, and for this purpose may use legitimate argument, entreaty, and importunity. (*Post, pp. 338–340.*)

Cases cited and approved: Nailing *v.* Nailing, 2 Sneed, 630; Smith *v.* Harrison, 2 Heis., 230; Simerly *v.* Hurley, 9 Lea, 711; 31 Am. St. Rep., 679.

FROM HICKMAN.

Appeal from Circuit Court of Hickman County. W. L. GRIGSBY, J.

VERTREES & VERTREES, W. P. CLARK, R. L. PEERY, and H. M. MCADOO for Appellants.

PITTS & MEEKS and T. L. LANIER for Appellees.

WILKES, J. This is a contest of the will of Marcenus G. Peery, upon an issue of *devisavit vel non*. The issues tendered in the Circuit Court were, first, that the paper writing was not the last will of M. G. Peery, and, second, that it was not such will, because it was procured to be executed by improper means and undue influence. The cause was tried before the Court and a jury, and a verdict and judgment rendered against the validity of the will, and proponents have appealed and assigned errors.

It is assigned as error that the Court admitted certain declarations made by the testator to his son, M. B. Peery, some weeks before his death, and about six months after the will was made. The substance of this declaration made by the father is, that he had to make the will as he did in order to have peace at home. This evidence was excepted to as hearsay, and because it could not be introduced to impeach the will as made, and the objections were overruled.

It has been held that the testator's declarations, after making the will, are admissible to show his mental condition at the time the will was made, but not to show undue influence. If, therefore, the

latter had been the only issue tendered by the pleadings in this case, the evidence would have been incompetent and inadmissible. But inasmuch as under the pleadings, the general issue of will or no will was tendered, it was admissible to introduce evidence to show the testator's mental condition at the time the will was made, and evidence was introduced to show that the testator's mind had become enfeebled by disease.

The proponents were entitled, on request, to have this testimony limited by the Court to the point of the testator's mental condition at the time the will was made, and to have the jury instructed that they must look to it for that purpose alone; but, in the absence of any request to so limit it, the objection was too broad, and the Court was not in error in refusing to exclude the declarations, and in failing to limit them. It is true the main contest in this case is over the question of undue influence, and it was so treated by counsel and Court, still, the issue of mental infirmity was tendered in the pleadings, and to some extent supported by evidence, and it cannot be overlooked or ignored.

Upon the general question of admitting such declarations, see Pritchard on Wills, Sec. 147, and cases cited; *Beadles* v. *Alexander*, 9 Bax., 604, 606; *Linch* v. *Linch*, 1 Lea, 526; *Maxwell* v. *Hill*, 5 Pickle, 584, 594, 595. See also, *In re Hess' Will*, 31 Am. State Rep., note, page 690. In *Beadles* v. *Alexander*, 9 Bax., 604, the declarations

were admitted to show that the testator signed the will. In *Reel* v. *Reel*, 9 Am. Dec., 632, to show whether the testator knew the contents of the will. In *Maxwell* v. *Hill*, 5 Pickle, 595, to show whether the testatrix fully comprehended and approved the will as written. *Linch* v. *Linch*, 1 Lea, 526, simply approves the case of *Beadles* v. *Alexander*, 9 Bax. None of these cases are authority for the proposition that subsequent declarations are admissible where the only issue is that of undue influence.

Other errors are assigned which we need not consider in detail in the view which we have taken of the case. The first and most material assignment is, that there is no proper and sufficient evidence to support the verdict.

The rule laid down as to the force and effect of a jury's verdict is not different in cases of contested wills from that laid down in other cases, and we proceed to examine the facts as tested by the usual rule.

The testator died in 1888, being about seventy-four years of age. He had been twice married. By his first wife he had four sons, who are the contestants of the will. By his second wife he had three sons, one of whom died, and the other two, with his widow, are the chief beneficiaries under the will. His second wife had also two children by her first marriage, before she married the testator. There were thus three sets of children, two of them the children of the testator, and the other set, the

children of his second wife by a former husband. The testator lived happily with his last wife twenty-eight years, but the several sets of children did not agree. The consequence was that the husband's children by his first wife and the wife's children by her first husband, left the roof tree, and only the last set of children remained with their parents. This arrangement seems to have caused no disagreement between the husband and wife. The testator is shown to have been a quiet, honest, just man, of excellent character, and more than ordinary education; a man of firm and decided views and opinions. Mrs. Peery was a woman of strong will and quick temper, and, for a part of her married life, was in bad health and nervous, but had recovered before the will was executed. There is no direct evidence of any disagreement between the husband and wife during the whole of their married life. The testator owned a home place, worth from five to six hundred dollars, a one seventh interest in a body of timber lands, containing some 10,000 acres, worth, perhaps, one dollar per acre, and about $900 in good cash notes. By his will, he gave the home place to his wife for life, and the remainder to his last set of children, charging them with $400 in favor of his first children. He gave also to his first children the one seventh interest in the timbered land, and divided equally all his other property between all his children, giving nothing to his wife's children by the first marriage. The will was

executed March 8, 1888, and the testator died in September, 1888, about six months thereafter.

It is not insisted that the testator did not have mental capacity sufficient to make a will, but there is proof that for some years his health had been precarious from a heart trouble, and that his mind was not as active or vigorous as it had been formerly. There is no evidence that the last set of children had anything to do with making the will or causing it to be made. The contention is wholly that the undue influence was exercised by the wife in favor of this last set of children. It is not insisted that she attempted to get anything for her own first set of children, and there is no evidence tending in that direction, except the testimony of a single witness. A summary of the testimony is as follows:

Mr. McLanahan testified that about twenty-five years ago he had a conversation with the testator, in which he stated that he thought as much of one of his children as of another, and was going to treat them all alike.

M. B. Peery, one of the first set of children and the principal contestant, states that he repeatedly heard Mrs. Peery say she intended to see that the older children got nothing off the place, and that she intended to see that her husband made a will and cut the older children out. This was some twelve or fifteen years before the will was made.

In 1878 or 1879, J. D. Aydelotte, heard Mrs.

Peery say she thought the children of the last marriage ought to have the property, as they had remained with and worked for the old folks, while the first set had gone off and worked for themselves, but he did not hear her say anything about a will.

About the year 1884, Ras Hill heard Mr. Peery say that his wife had been after him to make a will and give her children by her first husband a share with the others, and he had promised her to do so, but that he did not intend to make a will if he died in his right mind, but intended to treat all his children alike.

Mrs. Mary Hutchison testified that Mrs. Peery told her that she was going to see that the property was willed to the younger children, as the older ones were off, working for themselves.

Mrs. Burchard testified that she heard Mrs. Peery say it looked to her like the younger children ought to have the property, as they had stayed at home, while the older children had gone off, working for themselves.

Mrs. Cave Peery says that, about twenty-three years ago, she heard Mrs. Peery say that she intended to see to it that Mr. Peery made a will.

Frank Nunn testifies that, about 1870, Mr. Peery, at his wife's request, stopped a plow that she might have a horse to make a visit. She was then in bad health. He heard her say that she intended to have him make a will, and leave the children of the first marriage out.

Mrs. Lindsley lived with Mr. Peery about 1882, and heard Mrs. Peery say she thought the land ought to be willed to the younger children.

J. S. Prince states that he heard the testator say he did not intend to make a will; that the law made a good enough will, and he intended to treat his children all alike. This was some one to three years before his death.

Mrs. Gracey Whiteside testified that, a short time before the will was made, she heard Mrs. Peery say she thought her husband ought to made a will and give the home place to the younger children, because they had stayed at home and worked, while the others had gone off.

M. B. Peery, one of the first set of children, testifies that, in 1888, after the will was made, he asked his father why he had made such a will as he had made, and his father replied that Mrs. Peery had been after him for years to make a will, and that he had to make it as he did to have peace at home.

The will was written by J. H. Peery, a young attorney, who was the kinsman of the testator. The testator personally went after him to his father's home, to get him to write the will, and told him how he wanted it written, and discussed with him his pecuniary condition. The attorney went to the testator's home, March 7, 1888, to write the will, and remained there all night, and the will was written that night. Mrs. Peery, the wife, was in the

room, lying on the bed. After the will was written, the testator suggested the insertion of some words that had been inadvertently left out, and they were inserted at his suggestion. He read the will over the next morning, and said it was all right. The attorney then copied or redrafted it, so as to have a clean copy. Neighbors were sent for to witness it, which they did at the testator's direct request. It is shown that the testator dictated the will, and stated to the witnesses that it was his will, and he had read it over carefully, and that it was just as he wanted it, and asked them to witness it as his will, and, when it was executed, no one was present but the testator and the witnesses. A few weeks afterward, while riding home from Centreville with Mr. Hill, one of the subscribing witnesses, he brought up the subject of the will, and told Mr. Hill of its contents, and expressed satisfaction with its provisions, and said that the older boys had left him when young, and all had homes but M. B. Peery, called "Bas;" he could have had one if he had tried or wanted one. He also stated that he intended to go to Kentucky, and give his children there some money, meaning his first set of children. There is evidence also that the will is similar to that made by the testator's father, who was somewhat similarly situated. There is evidence of a general character showing that Mrs. Peery dominated and controlled her household affairs and other matters in which she was interested, but none that she coerced or compelled

her husband to do anything he did not desire to do, or that she influenced him, except by her influence and love.

This is substantially all the evidence in the case upon which the jury found against the will, and the question is, Is there any evidence of the kind and character required to set aside a will in this record? It has been said that it is impossible to define what it takes to constitute undue influence in any such general language as would be applicable to all cases, but it has been well said that the question, reduced to its last analysis, is "whether the will is the will of the testator or that of another." *McClure* v. *McClure*, 2 Pickle, 176; Pritchard on Wills, Sec. 128. It is not influence that vitiates, but undue influence; and it must go to the extent of depriving the testator of his free agency, and amount to moral coercion which he is unable to resist. *Nailing* v. *Nailing*, 2 Sneed, 630; *Wisener* v. *Maupin*, 2 Bax., 364. Each case must rest upon its own circumstances, and be controlled, to some extent, by the mental characteristics, and the mental and physical condition, of the testator, and, in a subordinate degree, by the mental strength and will power of the dominating influence, as well as the opportunities for its exercise. *McClure* v. *McClure*, 2 Pickle, 176. When the charge is that such undue influence is exercised by the wife, other considerations also enter into the matter. It cannot be presumed, because the wife has ample opportu-

nity and inducement to exert such influence, that she has done so, but it must be shown that she has exerted such influence for an improper purpose. The fact that a wife has a great influence over her husband in the ordinary affairs of life, and exercised control over his home and domestic concerns, raises no presumption against her in the matter of his will. All of these things are perfectly consistent with wifely duty and privilege, and the legitimate result of that influence which love and affection should exert. *McClure* v. *McClure*, 2 Pickle, 173; *Small* v. *Small*, 16 Am. Dec., 253. As a general proposition, a father has a legal right to make his will as he chooses, even though it may seem to his children to be unjust and inequitable; and a wife has a right to advise with and counsel her husband to make such a will as she deems just and proper, and neither the Courts nor juries have any right to disturb such wills if they are freely made by the testator. And this is so even though the wife uses legitimate argument, entreaty, and importunity in order to shape its provisions in favor of herself or children. *Hughes* v. *Murtha*, 32 N. J. Eq., 288; *Nailing* v. *Nailing*, 2 Sneed, 63; *Smith* v. *Harrison*, 2 Heis., 230, 247, 250; *Simerly* v. *Hurley*, 9 Lea, 711. We know of no rule of law or morals that makes it unlawful or improper for a wife to use her influence for her own benefit or for the benefit of others, unless she acts fraudulently, or extorts benefits from her husband

where he is not in a condition to exercise his faculties as a free agent. Every faithful wife has, and ought to have, a very great influence over her husband, and it would be monstrous to deny her the right to express a wish about the disposition of property which, in a majority of cases, she assists in creating and preserving. See cases in 31 Am. State Repts., 679; *In re Hess' Will* and notes. It is true undue influence may be proven by circumstantial evidence, but still it must go to the extent of showing that the testator was dominated beyond his control and deprived of his free agency. It is also true that a wife has ample opportunities to exert her influence secretly upon her husband, but it cannot be presumed, in the absence of any proof, that it was unduly exercised to constrain him to do that which he otherwise would not do. It should be borne in mind also that a testator, when he lives for any length of time after making his will, has ample opportunity to change his will, if he so desire, or make another, and this without the knowledge of the wife or other interested party.

There is a discrimination in this will in favor of the younger children, but is explained upon grounds not unreasonable, and there is no such inequality in the distribution of the estate as to shock the conscience of the Court or to raise a presumption against the will upon its face. The evidence is ample, and it is conceded, the testator had mental capacity to make a will, though his health and

vigor of mind had been, to some extent, impaired by disease. Outside of the declaration made to "Bas" (M. B. Peery) by the testator, we are unable to find any evidence in this record directly connecting Mrs. Peery with the making of this will in any way whatever. Although many of the witnesses lived with Mr. and Mrs. Peery for many years, and were intimately acquainted with them, not one of them testifies to any conversation between the husband and wife in regard to a will, and, so far as this record goes, no such conversation ever occurred. It is hardly possible that the wife could have kept up her importunities for twenty years or more, as counsel contend, and yet no one be able to tell of a single conversation with her husband. It is not proven that she was instrumental in getting a draftsman for the will, or that she ever spoke to him about the will, unless, perhaps, on one occasion she inquired when he could attend to that business. That she was in the room when the will was written is shown; but it is not shown that she said or did anything, and she was not present when it was signed and witnessed.

While the will shows a preference for the younger children, the reason for it is given, and appears to be not only natural, but reasonable. If the wife had such controlling influence over her husband as to completely dominate his will, and deprive him of his free agency (and the evidence must go to that extent to be effective), it is strange she did not

compel some provision for her own children, the most natural thing to do under such circumstances. The evidence consists wholly of declarations of the wife as to what she desired and intended to have done. In some cases the declarations were that she wanted a will which would leave out the older children, and intended it should be so made. In other cases, that she thought a will ought to be made; and, again, that she thought a will ought to be made to give the home place to the younger children, because they had remained and worked for them, while the others had gone away as soon as they could to work for themselves. All of these declarations were made from twelve to twenty-five years before the will was made, except one or two, and these of no very definite character. No importunity or threat or act on her part towards her husband is shown. No conversation is proven between them, no altercation, no irritation or estrangement. The only testimony showing that the testator ever had any conversation with his wife about a will is his statement to Hill that his wife wanted him to give her children a share, which he did not do, and which, it seems, was never repeated, and his statement to contestant, M. B. Peery, that he had to make the will as he did in order to have peace at home.

The declaration made to M. B. Peery by the testator is not sufficient to prove the fact of undue influence. Undue influence cannot be supported alone

by the subsequent declarations of the testator. If there be other evidence of undue influence, then such declaration could be looked to to determine the effect which such influence had upon the testator, but not to prove the substantive fact of undue influence. *In re Hess' Will*, 31 Am. State Repts., 690, note, and cases there collated.

It is shown that the testator, some time after making his will, spoke of its provisions to one of the subscribing witnesses, and expressed satisfaction with its contents, and explained why he made an apparently unequal division of his property. He had then had ample time and opportunity to have revoked it, as it was in the custody of the draftsman, and not of his wife; or he could have easily have had another written. This is a strong, convincing indication that it was his will, and according to his desires. *Floyd* v. *Floyd*, 49 Am. Dec., 626; *Irish* v. *Smith*, 11 Am. Dec., 648.

In all cases where undue influence is attempted to be proven, the case must turn, not upon the number of witnesses examined, but the character and force of their testimony, and the inquiry is, Does the testimony go to the extent of showing the exercise of such undue influence and dominion by the wife over the husband as deprived him of his free agency in making his will, and made it her will instead of his? If it fail to come up to this point, it matters not how great the number of witnesses, or how large the volume of testimony, there is no

proper or legal evidence upon which to set aside the will. We find no evidence of this character in this record, and the cause is reversed and remanded for a new trial.

Contestants will pay the costs of appeal.

BYERS *v.* RAILROAD

AND

ALISTON *v.* RAILROAD.

(*Nashville.* January 26, 1895.)

1. COMPROMISE. *Release of claim for damages.*

Release of claim for damages against a railroad company for the killing of her husband and son, her only means of support, given by an illiterate woman, in ignorance of her rights, and in a state of extreme distress and destitution, in consideration of a railroad ticket worth $3.25 and $70 in money, is not such compromise of her rights as will bar further recovery. (*Post, pp. 347–349.*)

2. WITNESS. *Use of books on examination of experts.*

When a witness testifies as an expert, it is competent to test his knowledge and accuracy, upon cross-examination, by reading to him, or having him read, extracts from standard authorities upon the subject-matter involved, and then asking him whether he agreed or disagreed with the authorities, and comparing his opinion with that of the writer. This principle is here applied to the case of a book treating of air brakes, on the examination of a railroad engineer. (*Post, pp. 349–351.*)

Cases cited and approved: 7 L. R. A., 90; 89 Cal., 399; 48 A. & E. R. R. Cases, 111; 56 Conn., 485; 30 Wis., 614.

3. EVIDENCE. *Reading from scientific works.*

It is error to permit the reading in evidence of scientific books to contradict the testimony of expert witnesses, except in connection with, and as part of, the examination of such witnesses. The objection, however, to the reading of such books is insufficient when made to their use on cross-examination of the witnesses, and not kept up to the subsequent independent reading of them in evidence. (*Post, p. 351.*)

4. SAME. *Of tests or experiments.*

In suit against railroad for death of person struck by its train, it is competent for defendant to prove, by one of its engineers, an *ex parte* test, made subsequently to the accident, for the purpose of showing that the train that caused the death could not have been stopped after the person killed could have been seen upon the track, when it appears that the test was made at the same place, and under conditions that were, so far as practicable, identical with those surrounding the accident. That the test was *ex parte*, and such as could be made by only one of the parties, goes not to its competency, but to its weight. (*Post, pp. 352–355.*)

Cases cited and approved: Boyd *v.* State, 14 Lea, 161; Lipes *v.* State, 15 Lea, 125; Railroad *v.* Ayers, 16 Lea, 725; 23 L. R. A., 861.

FROM COFFEE.

Appeal from Circuit Court of Coffee County. M. D. SMALLMAN, J.

WM. T. MURRAY for Plaintiffs.

GEO. W. CROSS, CHAS. D. PORTER, EAST & FOGG, and J. D. B. DEBOW for Railroad.

WILKES, J. These causes are suits for personal injuries resulting in the death of Wm. Aliston and his son, Charles Aliston. The causes are different, but arise out of the same accident, and were heard upon substantially the same evidence in the Court below, and are heard together in this Court by agreement of counsel.

There was a verdict by a jury in each case, and judgment was rendered against the railroad company for $1,200 damages for the killing of the father, and $5,000 damages for killing the son, and both cases have been appealed by the railroad company, and it has assigned errors, raising, in the main, the same questions in each case. It appears that the father, with his son, nine years old, and a daughter, five years of age, was attempting to walk from Chattanooga to Nashville, with the intention of continuing the journey on foot to Illinois, where the father had formerly lived. A short distance from Wartrace, on the line of defendant's road, the party attempted to cross a railroad bridge of the company, known as Garrison's bridge, and, when they were about the middle of the bridge, which was about one hundred feet long, the father and son were met by a train coming from the direction of Nashville, knocked off the bridge, and killed. The little girl was thrown into the water, also, but escaped without serious injury. It appears that the father was a man about forty-two years of age, and that his eyesight was very much impaired. It is shown that he had been unfortunate, and was reduced to poverty. He came from Knoxville to Chattanooga, bringing with him his wife, a woman about twenty-eight years of age, and the two children, and there they became objects of charity, and were, to some extent, cared for by a charitable association of Chattanooga, until the father decided to make his way, with the chil-

dren, to Illinois, where he had some children by a former marriage, leaving the wife to return to Knoxville, where they had recently lived. Soon after the killing, the mother, being unable to support the little girl, gave her away, and, about the same time, signed a paper releasing all claims for damages against the company, upon the condition that the company give her a ticket to Knoxville, the usual cost of which is $3.35, and pay her the further sum of $70 in money, all of which was done. The company denies its liability for any damages whatever, and pleads that, if liable at all, this arrangement with Mrs. Aliston was a full compromise, satisfaction, and discharge of all liability. Many errors are assigned, which we will not consider in the order in which they are assigned, but as we may find most convenient in arriving at the real questions of difficulty, and the merits of the controversy.

It is assigned as error that the Court should have held the so-called compromise conclusive, and a bar to any further recovery. Compromises made in good faith of doubtful claims, by parties dealing with each other on equal terms, and with opportunities to know their rights, will be sustained by the Courts.

Without entering into detail, we think the arrangement in this case did not rise to the dignity and importance of a compromise, and that the company did not so regard it, but looked upon the amount paid more in the light of a contribution for chari-

table purposes to a woman in dire distress than otherwise. The wife had just lost her husband and son, her only hope of support, and had given away her daughter from necessity. She did not know her rights, evidently was illiterate, and, whether misled or not, she was surrounded by such circumstances, affliction, and distress as made her incompetent to pass upon and surrender her legal rights, if she had a meritorious cause of action, and we would not allow such an arrangement to prevent her recovery if entitled to it.

It is said that error was committed in the cross-examination of the witness, Fravel, the defendant's engineer. This witness testified not only as to the facts attending the killing, but also to some extent as an expert engineer. In conducting the cross-examination plaintiff's attorney used a book published by the Westinghouse Air Brake Company, giving an account of the brake manufactured by them. After several questions had been asked as to what the book was, and as to certain statements contained in it, defendant's attorney objected on the ground that the evidence was incompetent, but made no further or more specific statement of his objection, and it was overruled. After proceeding further, counsel objected to the reading of the book, but made no specific statement of the objection, and it was overruled. The objection, from its connection, does not appear to have been to the book as authority, but to the manner of using it; that is, the witness was

requested to read certain portions, whether to the jury or not does not appear, and was then asked questions as to the correctness of the statements therein, detailing certain tests made of the Westinghouse Air Brake. The witness stated that the book was considered good authority.

After the defendant had closed its evidence, the plaintiff offered evidence in rebuttal, and the plaintiff's attorney then read to the jury portions of the book showing tests made at Cincinnati, in 1887, with the Westinghouse Air Brake. No exception was at this time made to this, and no request was made to exclude it. If the book when first offered had been improperly admitted, it was not necessary to keep up the same objection when it was afterwards offered in the same way, and for the same purpose. But we are of opinion that the objections to the use of the book, as first made, were not well taken. The admission of such evidence is a matter largely in the discretion of the Court, as well as the mode of conducting the examination.

The witness, Fravel, was testifying not only as to the facts connected with the running of this train when the killing occurred, but also as an expert engineer, acquainted with and competent to testify as to the running of trains generally. When a witness is testifying as an expert, it is competent to test his knowledge and accuracy, upon cross-examination, by reading to him or having him read extracts from standard authorities upon the subject-

matter involved, and then asking him whether he agreed or disagreed with the authorities, and comparing his opinion with those of the writer. *Hess* v. *Lowery*, 7 L. R. A., 90; 89 Cal., 399; 48 A. & E. R. R. Cases, 111; 1 Greenleaf on Evidence, Sec. 440, note (15th Ed.).

We think it, therefore, admissible for the attorney to use the book in shaping his questions, and it was not error for him to require the witness to examine and read portions of the book, with a view of testing his knowledge by proper questions, and this, so far as the record shows, is all that was attempted to be done in the first examination, when the objection was made. But reading the book to the jury as evidence of the facts therein stated, and as a general rebuttal of the testimony of the expert, stands on a different basis. It does not appear that this was done during the examination and cross-examination of the defendant's witnesses, but after they were through, then the book was introduced again by the plaintiff's counsel and several pages read to the jury, and no objection was at this time made. In the absence of such objection, made when the book was thus offered and read for this purpose and in this way, there is no reversible error.

See 1 Greenleaf on Evidence (15th Ed.), Sec. 440, note E, in which the following propositions are laid down and cases cited in support: "The weight of current authority is decidedly against the admission

of scientific books in evidence before a jury and allowing such books to be read from to contradict an expert generally. However, it is a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subject under investigation and question him in regard thereto. Scientific books may be used by the attorney in framing his questions for the witness. He may read the question from such a book to the witness, either on direct or cross-examination. *Thompkins* v. *West*, 56 Conn., 485. And if an expert has quoted a book, it may be read to him to show that he has misquoted it. Underhill on Evidence, Sec. 189; *Rippon* v. *Bittel*, 30 Wis., 614."

It is next assigned as error that the Court excluded the testimony of Henry Mangrum, who, at the request of the company, made an actual test to see whether the train that caused the death could have been stopped after the engineer saw or could have seen the man on the bridge. This witness proposed to prove that he ran the same train on a different day, after the accident, over the same place and bridge; that he had the same number of coaches; that, in making the test, as soon as he could, by being on the lookout, see an object standing on the center of the bridge, he applied every means known to him or other skillful engineers, and used every endeavor to stop his train, and that it was impossible to stop such a train before passing over the

bridge, and that his entire train passed over the bridge before he was able to stop it. He further would have testified, if allowed, that he applied his air brakes, reversed his engine, and used every means known to engineers to effect the stop, but was unable to do so. This test was made by Mangrum for the purpose of making him a witness and proving the result of the test. This evidence, on objection, was not allowed to be given.

The authorities in other States are conflicting upon the admissibility of such evidence, and we have been cited to many cases, all of which we have examined. In our own State, it has been held that the evidence of an expert is not incompetent because of an *ex parte* examination, investigation, or experiment made by him. Nor is such evidence inadmissible because the experiments are made after the suit and trial has begun, and with a view to being used as testimony in the case. The objection in such cases goes not to the competency or admissibility of the testimony, which is a matter for the Court to determine, but to its weight and sufficiency before the jury, and especially is this the case where the experiment is made *ex parte*, and is such that it lies wholly within the power of one party and wholly beyond the power of another party to make such experiment. We have been cited to quite a number of authorities to sustain the contention that such evidence is incompetent and inadmissible in cases where the experiment is not equally

within the reach of both parties, but we have not been able to find this doctrine sustained. We do find cases, however, holding that where the experiment is made *ex parte* it affects its weight; that it was not made after due notice to the opposing party and giving such party opportunity to be present and see the test applied. That such evidence is competent, but its weight to be duly weighed by the jury is supported by the following authorities: *Boyd* v. *The State*, 14 Lea, 161; *Lipes* v. *The State*, 15 Lea, 125; *Miss. & Tenn. R. R. Co.* v. *Jno. R. Ayers*, 16 Lea, 725; *C., St. L. & P. R. R. Co.* v. *Champion*, 23 L. R. A., 861; Underhill on Evidence, Sec. 201, and others in accord.

It is uniformly held that in all such tests, to make them competent, the conditions under which the tests were made must be the same as near as practicable. This requirement appears to have been substantially complied with in this case, and, judging from the testimony offered to be given, the conditions of the test were essentially the same as when the accident occurred.

We are of opinion the trial Judge was in error in not allowing evidence of this test to be introduced under proper instructions to the jury as to its weight. We cannot speculate on what might have been the verdict of the jury if this evidence had been allowed to be introduced. It was upon a vital point in the controversy. The plaintiff had been permitted to prove by a witness that he had

gone upon the tracks and measured the distance at which a man could be seen standing in the middle of the bridge, and a hot contest was made over the question how far a man could be seen on approaching the bridge, and opinions pro and con were introduced on the question whether it would be possible to stop the train after reaching a point where a man could first be seen by a lookout upon an approaching train. This is the turning point in the case, and the evidence was very conflicting, and for this error in the Court in rejecting evidence of this test, the cause must be reversed and remanded for a new trial.

We have examined all the other assignments of error, and we think none of them are well taken, but reverse simply upon the error indicated.

The appellees will pay the costs of appeal.

NASHVILLE *v.* SUTHERLAND & CO.

(*Nashville.* January 30, 1895.)

1. MUNICIPAL CORPORATIONS. *Liability for defective construction of public works.*

A city that contracts with one through whose land it constructs a sewer, to so construct it with a suitable valve as to prevent the water of the river from flowing back through the sewer in case of high tides, is responsible for damages resulting from the city engineer's negligence in selecting valve and constructing sewer. (*Post, pp. 357–365.*)

Cases cited: Nashville *v.* Sutherland & Co., 92 Tenn., 335; Burton *v.* Chattanooga, 7 Lea, 739.

2. SAME. *Same.*

A landowner who permits a city to construct a sewer through his premises under a contract that joints of the pipes shall be cemented, and a suitable valve supplied to prevent the water from flowing back from the river in case of high tides, does not waive or lose his right to damages caused by an overflow resulting from defective execution of the work, because he did not protest when he saw the joints were not cemented, and a valve different from that contracted for used under the supervision of the city engineer. (*Post, pp. 365–368.*)

3. SAME. *Measure of damages.*

In suit by the owner of a lumber yard against a city for damages caused by an overflow resulting from breach of its contract to so construct a sewer that plaintiff's premises will not be overflowed in case of high water, expenses incurred for labor, machinery, etc., in pumping out the water, by which the damages to the lumber is diminished, may be properly allowed. (*Post, p. 369.*)

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County. J. W. BONNER, J.

CLAUDE WALLER and FRANK SLEMONS for Nashville.

WHITMAN & GAMBLE for Sutherland & Co.

WILKES, J. This is an action by Sutherland & Co. against the city of Nashville for damages. There was a trial before the Court below and a jury, and a verdict and judgment for $1,768, and the city has appealed.

Sutherland & Co., in 1888, were the owners of certain property in Nashville, situated on the east side of the Cumberland River, on which was located a lumber yard and planing mill. Adjacent to this property was a pool or pond of stagnant water, which the Mayor and City Council, through the Board of Public Works and Affairs, desired to drain by means of a sewer-pipe, leading to the river through plaintiffs' premises. Specifications and plans of a suitable sewer, showing size and quality of pipe, means of connection at the river, and the manner in which the work was to be done, were prepared by the city engineer, and filed in his office. The Mayor, etc., did not condemn a right of way across the property in question, but an easement was purchased by the Board of Public Works and Affairs in the following contract, to wit:

"For and in consideration of one hundred and fifty dollars, cash to us in hand paid, the receipt of which is acknowledged, and other valuable considerations by us received from the Mayor and City

Council of Nashville, we, William Sutherland and Charles A. Graves, do hereby sell and grant unto the said Mayor and City Council of Nashville the right, power, authority, and privilege to enter upon the realty owned by us between Bridge Avenue and Main Street, and First Street and the Cumberland River, to construct, keep up, and maintain a sewer or drain, commencing at or near the west end of an alley, that is now in existence on said property, about midway between Bridge Avenue and Main Street, and which runs parallel to said streets to First Street. The said sewer or drain to be constructed according to the plans and specifications now on file in the city engineer's office, to which reference is expressly made, and the same is adopted as a part hereof as fully as if expressly set out and described in detail. So far as may be necessary in constructing and keeping up and in repair said sewer, an interest is hereby conveyed in said realty. We covenant, agree, and bind ourselves that we are lawfully seized and possessed of said realty, have a good right to convey it for such purposes, and that the same is unincumbered, and that we will warrant and defend the title against all lawful claims whatsoever.

"*It is further agreed, and the city of Nashville binds itself, to have said sewer so constructed with a suitable valve as will prevent, in case of high rise of river, the flowing of water from the river back through said pipe or sewer into the lot or premises*

of said Sutherland and Graves, to their injury or damage.

"The city further agrees to place the roadways of said parties back in as good condition as before the same is disturbed by the laying of said sewer-pipe; and, should said sewer have to be repaired at any time, the city will likewise put said roadway back in good and first-class condition. This the fifteenth day of June, 1888. WM. SUTHERLAND,

"CHAS. A. GRAVES."

Subsequently, on the eighteenth of June, 1888, the Board of Public Works and Affairs entered into a contract with Ryan & Shea, contractors, to construct the sewer according to the specifications filed in the city engineer's office, being the same referred to in the contract purchasing the right of way. This contract, with the specifications attached, is fully set out in the record. This contract was executed by the said Ryan & Shea, and the work was completed sometime in the summer or fall of the year 1888.

In March, 1890, something more than eighteen months after the sewer had been completed, there was a high rise in the Cumberland River, which overflowed Sutherland & Co.'s property. There was at that time a quantity of lumber stacked on the lot, a portion of which was overflowed and seriously damaged. For this damage Sutherland & Co. brought suit against the Mayor and City Council of Nashville.

There are three counts in the first declaration filed, each one alleging a breach, in several particulars, of the contract heretofore set out in full, by reason of which the water ran back through the sewer pipe and flooded their lumber and machinery.

In the first trial of the case, the Circuit Judge charged the jury that that portion of the contract set out above in italics was an absolute guarantee on the part of the city against injury. There was a verdict against the city, and, upon appeal to this Honorable Court, a new trial was granted, upon the ground that the provision insuring Sutherland & Co. against damage was *ultra vires*, so far as it undertook to make the city a guarantor against injury in any contingency. *Nashville* v. *Sutherland & Co.*, 8 Pickle, 335.

The first count in the original declaration is based upon the contract and the further allegation that, in constructing the sewer, worthless and unsuitable valve material was used, and that the sewer joints and valve connected therewith were constructed, laid, and joined together in a careless, negligent, improper, and unworkmanlike manner, which caused great quantities of water, during a freshet, to be forced back through the valve and pipes and sewer until it covered plaintiffs' lot and damaged their lumber stacked thereon with water and mud, and plaintiffs were put to great expense in trying to pump the water off the lot in order to prevent the same.

The second count is substantially the same, and

based upon the idea that improper material was used, and the work negligently done under the contract.

The third count sets out the contract, and alleges as a breach that unsuitable material was used, and the workmanship was defective, which caused the damage.

After the cause was remanded from the Supreme Court, an amended declaration was filed charging unsuitableness of the valve and other material used, and careless, negligent, and improper and unworkmanlike manner of construction and joining together, the result of which was the damage sued for without mentioning the contract. To this amended declaration the defendant filed a plea of not guilty, and the statute of limitations of three years. On the trial, and after the proof was all in, the trial Judge sustained the plea of the statute of limitations, the effect of which was to strike out the amended declaration.

It is claimed by the defendants in error that this flood caused them damage to lumber in the sum of $1,750, and expense in preventing increased damage, by way of employing engineers and firemen, $150; and for hauling to the premises a pump, and operating the same, $150; and for use of boilers, for fuel and oil, and for removing and replacing machinery, $250.

The first assignment of error is that there is no evidence to sustain the verdict.

The second assignment is that the Court erred in charging as follows:

"(*a*) The question for you to solve, so far as that (the valve) is concerned, is: Did the city use ordinary care in providing a backwater trap at that point? Was it reasonably sufficient, and reasonably adapted to the purpose for which it was designed? If so, there can be no liability accruing against the city on that account.

"(*b*) You will, then, gentlemen, consider all the circumstances of the case—location of the pipe, the method by which it opened into the pond and the method by which it was discharged into the river, the means provided by the city to prevent the flow of the backwater into the pipe, the manner in which the joints were constructed—and from all this you are to determine whether or not the city did or did not exercise ordinary diligence in doing this work. If it did exercise ordinary care, and, notwithstanding that fact, and without fault on its part, the plaintiff was injured, then your verdict should be for the defendants; but if they did fail to exercise ordinary care, and by reason thereof the plaintiff was injured, then your duty would be to find for the plaintiff.

"(*c*) In regard to damages: The damages which any party is entitled to recover must be such as are the natural and proximate result of the wrong complained of. Now, by natural is meant, simply, according to the natural course of events. By proximate is meant that which directly flows as an effect from some cause which is the sole, responsible, and

efficient cause of the injury. In other words, if the negligence of the city, in this case, was the responsible cause of the damage to the plaintiffs, the cause without which the injury would not have occurred, that would be the proximate cause.

"(*d*) The Court will charge you further, at the request of the plaintiffs, that it was the duty of the city, in providing a valve, or backwater trap, to make it reasonably safe and well adapted for the purposes for which it was designed."

The fifth assignment may be considered in connection with the second, and is that the charge, taken as a whole, was misleading and confusing to the jury, as follows: The jury is told that the suit is for a breach of contract, and then, subsequently, they are instructed, in arriving at the city's liability, to consider whether or not it exercised ordinary care in making the improvement; whereas, the principle which measures its liability is whether or not it did what it contracted to do. It is insisted that, under the original declaration, the suit being based upon the contract, the jury should have been instructed that the question was not whether the city exercised ordinary care, so as to escape common law liability, but did it construct the sewer according to the contract; and that the specifications of the contract furnish the limits to the rights and responsibilities of the parties.

The contract in this case makes the specifications of the city engineer a part of the contract, and it

must be read in connection with these specifications, as the contract gives no specifications on its face. These specifications, so far as material, provide that the whole of the joints shall be thoroughly cemented and made water tight. The whole of the brick-work shall be set in cement mortar as specified. The manhole to be furnished with an iron frame and curve in accordance with the drawings of the same. There is a provision as to the composition of the mortar, that it shall be one part cement of the best quality, of a certain tensile strength. It further provides for one manhole complete, with fifteen inch backwater trap. The pipes must be packed at least six inches above them, and the trench must be refilled and carefully rammed; the engineer to have full power to condemn all defective or unsuitable material or work.

It is evident from its terms that this contract obligates the city to condemn all defective or unsuitable material or work, or, what is the same thing, to use only suitable material, and have the work carefully and properly done. It is also apparent that the plaintiffs were then relying upon the city's guarantee, and it was but natural that they should feel disposed to leave the selection of material and mode of construction to the superior knowledge and skill of the city engineer.

It will be noticed that the backwater trap is not in any way described in the specifications, but the joints and pipes were to be laid in cement, and the

entrance to the sewer was to be provided with a netting to keep out drift; and the gravamen of the charge is that the water trap was unsuitable; that the water pipes and joints were not laid in cement, and a network was not placed over the entrance.

Conceding that the city could not be held as a guarantor, and that, so far as material and mode of construction were specifically set out in the engineer's specifications, the plaintiffs could insist upon nothing different, still, it is true that, under this contract, the kind of a water trap was left to the discretion of the city engineer; and the charge of the Court was, in substance, that, in selecting such valve or trap, and in constructing the sewer, laying the pipe, and cementing the joints, the city must use ordinary care, and would be responsible for the want of such care; and this is correct, both under the contract and the idea of a common law liability. *Burton* v. *Chattanooga*, 7 Lea, 739; Jones on Negligence of Municipal Corp., Secs. 139, 143, 144.

It is insisted that the plaintiffs, with full knowledge, acquiesced in the manner in which the work was executed, and made no objection to the kind of water valve or trap furnished, or to the manner in which the pipes were laid, for more than a year after the work was completed, and until the damage was done, and hence they are estopped to claim damages.

In this connection, the Circuit Judge was requested to charge the following propositions:

"1. If you find from the evidence that the plaintiffs, or either of them, were present, from time to time, when the sewer was being constructed, and knew that the joints of pipe were not being laid in cement, as the plans and specifications required, and made no complaint to the officers and agents of the city on account thereof, but permitted the city, or its contractors, to lay said pipes across their property without laying the joints in cement, then they cannot hold the city liable for any damages resulting from a variation from the specifications as to cemented joints.

"2. If you find from the evidence that the plaintiffs knew that the joints were not being laid in cement, as the specifications required, made no complaint on account thereof, and acquiesced in the variation from the specifications, then the city is not liable for a suit for a breach of contract from any damages resulting from such variation.

"3. If you find from the evidence that the plaintiffs knew, as the work progressed through their property, that the joints were not cemented, then the measure of damages for a breach of contract for a failure to cement the joints is the cost of cementing said joints, for plaintiffs could have done this, and it was their duty to have it done, if they believed it necessary to the protection of their property.

"4. If you find from the evidence that the plaintiffs knew when the water valve was put in that it

was ineffectual for the purpose for which it was intended, and that such a valve would subject their property to overflow, then it was their duty, in order to protect their property, to procure a suitable valve; and, if they failed to do this, they were guilty of contributory negligence, and therefore cannot recover from any damage resulting on account of the valve used.

"5. The defendants, the Mayor and City Council of Nashville, cannot, by contract, destroy the discretion and judgment of its officers and agents in carrying out public improvements. It has no right, by its officers and agents, to bind itself to carry out public improvements upon an impossible and impracticable plan. If, therefore,. you find that the agents and officers bound themselves to the plaintiffs to cement the joints in the sewer in question, and that it has been proved in evidence by experts that it developed in the prosecution of the work that it was impossible or impracticable to cement said joints, then the contract binding the city to cement the same is void, and of no effect." All of which were refused, and no charge was given upon the question of acquiescence or estoppel.

It must be borne in mind that this work was being done for the benefit of the city, and not for the plaintiffs, or at their request, and their premises were being used simply as a convenient, if not indispensable, way to reach the river and effect the drainage. The contract to build the sewer was be-

tween the city and contractor, and the plaintiffs were in nowise responsible for the materials used or the manner in which the work was done, except so far as was specifically provided in the contract. The kind of material used and the character of the work to be done was, in the first instance, in the discretion and sound judgment of the corporation, and it was the duty of the corporation to select such a valve or water trap as would be reasonably fit for the purposes for which it was to be used, and to so lay and cement the pipes as to make them effective to protect the plaintiffs' premises from all overflow, to which it had not been previously subjected. The fact that the city adopted and used a kind of water trap different from that deemed best by plaintiffs, and that it laid the pipes without cement, either from necessity or because some other mode was deemed best by the city engineer, did not make it incumbent on the plaintiffs to protest or enjoin the city, but they were warranted in permitting the city to take the risk of the apparatus used and the manner of construction, and the plaintiffs cannot be prejudiced in acquiescing in the supposed superior judgment of the city engineer as to material and construction until they were shown, by actual test, to be faulty. It cannot be held that the citizen must set up his judgment against that of an expert engineer and be prejudiced if he fail to do so. *Burton* v. *Chattanooga*, 7 Lea, 739; Jones on Neg. Mun. Corp., Secs. 142, 143, 144, 155.

There is abundant evidence to show the liability of the city, and the only question remaining is as to the measure of damages. The Court instructed the jury that, if they found the city liable, they could give Sutherland & Co. the damage to the lumber, expense of pumping, etc., to prevent increased damage, wages paid engineer and firemen during overflow, hauling pump and returning same, etc., and it is insisted these are not proper elements of damage in this case. We see no error in this. The plaintiff's yards were being used for stacking lumber when this sewer was put in. Previous to that time such lumber was safe from damage by overflow. After that, when the freshet came, plaintiff's premises were inundated; as a consequence of this overflow, their lumber was damaged. Such damage the city is liable for. It is shown that this damage was decreased by the use of pumps and labor furnished by plaintiff, and greatly reduced the damage that would otherwise have ensued.

We think these are legitimate items of damage, and the jury, from the proof, was well warranted in so finding.

The judgment is affirmed with costs.

PORTER *v.* WATERS-ALLEN, ETC., CO.

(*Nashville.* February 2, 1895.)

MASTER AND SERVANT. *Master's liability for injury to fellow-servant.*

An employe does not, by voluntarily engaging in labor with convicts in his master's employ, release the latter from liability for injuries sustained by him in consequence of the negligent and reckless act of his convict fellow-servant, where the master failed to exercise the requisite care in employing and retaining the convicts.

Cases cited and approved: Iron Co. *v.* Dobson, 7 Lea, 373; 107 U. S., 454.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County. N. D. MALONE, Sp. J.

MATT. W. ALLEN for Porter.

STOKES & STOKES for Machine Works.

CALDWELL, J. Richard Porter brought this action against the Waters-Allen Foundry & Machine Company to recover $5,000 as damages for personal injuries claimed to have been received by him while engaged in its service. Verdict and judgment were rendered in favor of the defendant, and the plaintiff appealed in error.

The gravamen of the action is that the defendant wrongfully, negligently, and without proper instructions, took the plaintiff from the safe position in its foundry in which he had contracted and was accustomed to serve, and required him to perform the dangerous labor of a moulder, with which he was not familiar; and that, in the latter employment, the defendant wrongfully and negligently associated him with incompetent, negligent, and reckless convicts, whose misconduct, in the course of their joint labor, and without any fault on plaintiff's part, caused the injuries of which he complains.

On the question of improper association with unsuitable fellow-servants, the trial Judge charged the jury, among other things, as follows: "If you find from the evidence that plaintiff voluntarily went with defendant to the prison works, knowing he would be associated with convicts, or, after reaching there, found out he was to work with them, then he would be held to have assumed the risks of such employment, and cannot recover; or, if you find he knew, or by reasonable diligence could have known, that his waiters were incompetent, and continued to work with them without complaint to the master, and a promise to supply a better one, then he assumed that risk, and cannot recover."

This instruction, though embraced in a single sentence, contains two separate and independent propositions, either of which, if established, would inevita-

bly defeat the plaintiff's action. The first proposition is fatally erroneous, in that it makes the plaintiff's right of recovery depend exclusively upon the single question as to whether or not he voluntarily engaged in labor with convicts, without reference to the care or want of care exercised by the defendant in employing the convicts. It may well be said that the plaintiff assumed all responsibility for his association with convicts, as such, if he voluntarily entered into the defendant's service with them, but he did not thereby release the defendant from liability for any injuries that he might sustain in consequence of any failure on the part of the defendant to use the requisite caution in employing and retaining the convicts in its service. It is plain and familiar law, that the master shall exercise reasonable care in the selection and retention of his servants; and that he shall not associate one of them with another, or others, whom he knows, or, by reasonable care, could know, to be incompetent. Wood's Master and Servant (2d Ed.), Secs. 417, 418; 2 Thompson on Negligence, p. 974, Sec. 4; 7 Am. and Eng. Ency. Law, pp. 844, 848; *Iron Co.* v. *Dodson*, 7 Lea, 373; *Wabash Ry. Co.* v. *McDaniels*, 107 U. S., 454.

The duty of the master in this respect is affirmative and positive; and it is the same whether all of those employed be free laborers, or part of them be free and part convict, as in the present case. The same reasons for the rule exist in both

cases. The defendant owed the plaintiff that duty, notwithstanding the fact that he may have agreed, voluntarily, to work with convicts; and the jury should have been so instructed. The error indicated was not corrected, nor was its hurtful influence diminished by other portions of the charge. Though the jury might have found every other question in the case in favor of the plaintiff, they were compelled to return their verdict against him if they found that he voluntarily worked with convicts.

Reverse and remand for a new trial.

NASHVILLE LUMBER CO. *v.* FOURTH NATIONAL BANK.

(*Nashville.* February 4, 1895.)

BILLS AND NOTES. *Liability upon fraudulent indorsement.*

The transfer of a negotiable note, by which an accommodation indorser is made liable to a *bona fide* holder for the ultimate benefit of the transferer, who knew the indorsement was *ultra vires* and void, makes the transferer liable to such indorser for the damage sustained, for which suit can be maintained before payment of note.

Cases cited and approved: 8 L. R. A., 253; 2 L. R. A., 249; 12 N. Y., 313; 73 N. Y., 305, 269; 107 N. Y., 159; 3 N. Y. S. R., 309; 33 Hun, 250; 97 N. Y., 324.

Cases cited and distinguished: 120 Mon., 424; 82 N. Y,, 396.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County. J. W. BONNER, J.

GRANBERY & MARKS for Lumber Co.

P. D. MADDIN for Bank.

WILKES, J. This is a suit for damages for wrongfully transferring negotiable paper to an innocent holder for the purpose of imposing upon the complainant, as indorser, a liability that would not

have existed if the note had not been so transferred, and thereby securing an advantage for the transferer of the paper. There was a demurrer to the declaration, which was sustained by the Court, and plaintiff appealed, and has assigned errors.

The case, as made out by the declaration, is that certain notes made by the Bond Lumber Company had placed upon them the indorsement of the Nashville Lumber Company. This indorsement was made by the secretary of the Nashville Lumber Company, not only for accommodation, but without any legal authority, and was *ultra vires* and void. The defendant bank held the notes thus indorsed, with legal notice of their infirmity when made and indorsed, and, while so holding them, the plaintiff company further notified it that the indorsement was without consideration, illegal, and void, and that the company would recognize no liability on account of the same.

Prior to maturity, the defendant bank indorsed the notes to the Merchants' National Bank of Louisville, and had them rediscounted by that bank. The maker of the notes was insolvent when the notes were transferred to the Louisville bank, and the declaration states that the Nashville bank fraudulently rediscounted the notes for the sole purpose of creating a liability against the plaintiff company which did not before exist, and, because of the creation of this liability, plaintiff claims the right to sue. Judgment has been rendered in favor of the Louisville bank against plaintiff company for the amount of the

notes, it not being able to defend against the Louisville bank, and a part of the same has been paid. Such is the case as made out in the bill. Several of the grounds of demurrer are not well laid, but we treat them together, as raising the real question at issue in the cause, which may be briefly stated as follows:

Can the holder of negotiable paper, upon which there is the void indorsement of a corporation, known to be void by the holder, transfer it to a third party with no knowledge of the infirmity, and thus create a liability against the indorser, which did not exist in the hands of the holder before transfer? The gist of the action is the knowingly transferring the paper for the express purpose of creating such liability as did not exist before the transfer, and by which the transferer is to be benefited.

While some special objections are raised by the demurrer to the form of the declaration and the statements contained in it, these objections are more technical than real, and the effect of the demurrer is virtually to concede that the defendant bank had no right to recover upon the paper when it made the transfer, and that it was transferred to the Louisville bank, apparently in due course of trade, for the express purpose of enabling that bank to collect the note despite the infirmity in it, the proceeds to be held for the use and benefit of the Nashville bank, and thus imposing a liability on the indorser that did not exist while the Nashville bank held the note.

On the other hand, plaintiff concedes that the Nashville bank might, if holding in good faith, have transferred the note in due course of trade, and made plaintiff liable to the transferee, without liability against it, for such transfer; but the gravamen of the charge is that the transfer was made not in due course of trade, so far as the Nashville bank was concerned, but fraudulently, to enable the Louisville bank, as an apparently innocent holder, to collect the proceeds and hold them for the use and benefit of the Nashville bank, thus enabling the Nashville bank, through the Louisville bank, to collect the note from plaintiff as indorser, which it could not do if it retained the note in its own possession.

The plaintiff insists that, while the notes affected by this infirmity, so far as the Nashville bank is concerned, were in the hands of that bank, it had two remedies to protect itself—one to enjoin the transfer of the notes till the indorsement was erased, and the other to notify the holder of the illegality of the indorsement, and of its non-liability on account of it. It is said the former course was doubtful and embarrassed, as the plaintiff company could not allege insolvency of the Nashville bank, nor that it was about to make the transfer. Hence, the latter course was pursued, and the claim now is for damages for making the transfer under the circumstances. We have been cited to no case directly in point, and perhaps there is none to be found,

though we think the principles involved have been settled upon a somewhat different state of facts in several cases.

The case of *Metropolitan Elevated Railway Co.* v. *Kneeland*, 8 L. R. A., 253, is relied on. That was an action for damages by the corporation against its directors, first, for illegally voting a salary to the president of the company, and, second, authorizing the issuance of negotiable notes therefor, which went into the hands of an innocent holder. The Court held that no liability attached to the directors for voting the salary, for that, being illegal, created no liability, but that such of the directors as voted to issue the negotiable notes were liable, because such notes did create a liability when they came into the hands of an innocent holder. The Court said: "We think the cases relating to this subject rest upon the principle that a person who fraudulently places in circulation the negotiable instrument of another, whether made by him or his apparent authority, and thereby renders him liable to pay the same to a *bona fide* purchaser, is guilty of a tort, and liable for the value of the note. The essential injury common to all cases of this character is the fraudulent imposition of liability. Hence, there should be a common remedy, whether it is called an action for conversion or in the nature of a conversion, or a special action on the case."

The case proceeds: "In what respect do the wrongful acts of the directors who negotiated the

notes differ from those cases which were held to authorize an action for conversion or an action in the nature of conversion of negotiable paper? Is there not in each the same presumption of damages springing from a liability wrongfully imposed? Were not all of these actions founded on the fact that the maker, real or apparent, of a negotiable instrument had, through the wrongful acts of another, become chargeable, so that he could be compelled to pay such instrument, which would not have ripened into a valid obligation against him but for such wrongful act?''

There are numerous cases holding a party liable for the unauthorized conversion of negotiable paper. In *Decker* v. *Mathews*, 12 N. Y., 313, it is said, in substance, that the gravamen of such action is the wrongful act of the defendant in causing a note without value, except to a *bona fide* holder, to become valuable by a sale thereof to such a purchaser as could enforce it against the plaintiff, and the right of action accrues as soon as the transfer is made, and before payment enforced.

In *Thayer* v. *Manly*, 73 N. Y., 305, defendant fraudulently induced plaintiff to execute and deliver to him these notes, but, before they matured, plaintiff demanded their return to him, which was refused. It was held that, as defendant had it in his power when suit began, to dispose of the notes to a *bona fide* holder, in whose hands they would have been valid, plaintiff was entitled to recover their full

value, which might be discharged by a return of the notes.

In *Farnham* v. *Benedict*, 107 N. Y., 159, defendant being in possession, without title, of certain town bonds that had been fraudulently issued through his procurement, and which were void in fact, but apparently valid, sold them to *bona fide* purchasers, and thus rendered them valid and binding on the town, which was compelled to pay them. It was held that he was liable to the town for the amount of the bonds, and that an action lay either in the nature of trover for the face of the bonds or for money had and received for the money realized therefrom, according to the rule laid down in *Comstock* v. *Hier*, 73 N. Y., 269.

In *Betz* v. *Daily*, 3 N. Y. S. R., 309, it was held that, in an action by a partner against his co-partner and others for fraudulently making notes in the name of the firm and negotiating them to innocent holders, the cause of action was complete when the wrong was done, and that payment of the notes was not essential to recovery, the Court holding that the injury was done when the notes were first negotiated.

In *Ontario* v. *Hill*, 33 Hun, 250, the defendants were held liable for wrongfully issuing the negotiable notes of a town, some of which had gone into the hands of innocent holders. This case was afterwards reversed, but not on this point. See *Ontario* v. *Hill*, 99 N. Y., 324. See, also, *Haas*

v. *Sackett*, 2 L. R. A., 249, and cases there cited.

In the case at bar, it is proper to remember that the Nashville bank had title to this paper as against the maker, and, so far as the maker is concerned, its transfer was in no sense a conversion of the paper, but it did not have the legal right to the plaintiff's indorsement, nor any right to pass it to another. Nevertheless, the transfer put the legal title of the paper and its indorsement in the Louisville bank, which had no notice of the infirmity of the paper, and hence the plaintiff could not defend against its suit. It must be borne in mind that the case at bar is not the case of an indorser who has received value for his name and credit, and who then seeks to avoid the contract, in which case he must refund the money, or be denied relief, and hence many of the cases cited for the bank do not apply, and need not be commented on.

The case of *Freeman* v. *Venner*, 120 Mass., 424, is specially relied on by defendant bank, but in that case the plaintiff, upon his own showing, could not impeach the defendant's title to the note, nor his right to transfer that title to another, and it is not therefore analogous to this.

The case of *Solinger* v. *Earle*, 82 N. Y., 396–400, is also relied on, but in that case the party who sought damages for the unauthorized use of his note was denied relief because he was guilty of a

legal wrong in putting the note into existence, and the Court repelled him because of this wrong.

In this case at bar, however, the plaintiff company did not put its indorsement into circulation, but it was made without consideration, for accommodation, and without authority by its secretary, and without knowledge of the directory.

The case, as presented to us by the declaration and demurrer, is that of a holder of paper upon which it cannot legally recover against an indorser transferring that paper to a third person so as to enable such person to collect the paper from the indorser, not for the transferee's benefit and in due course of trade, but for the use and benefit of the transferring bank, and thus indirectly holding the indorser liable when the transferring bank could not regularly so hold it. The principle would be the same if the bank at Nashville had held the note of the plaintiff on which it was maker, and which for any reason was void, and had before maturity transferred it to the Louisville bank, in order to enable it to collect it for account of the Nashville bank. In each case it is an appropriation to its own use by forms of law of the credit and money of the indorser or maker to which the Nashville bank had no right, and we think the case falls within the reason of the cases here cited.

We are of opinion there is error in the ruling of the Court below, and it is reversed, and cause remanded for trial.

*Railroad *v.* Hailey.

(*Nashville.* February 7, 1895.)

COMMON CARRIER. *Of passengers.*

A passenger on a freight train with the conductor's permission, but knowing that he is riding in violation of the rules of the road, assumes the risks of accidents.

Cases cited and approved: Washburn *v.* Railroad, 3 Head, 638; Railroad *v.* Meacham, 91 Tenn., 428; Trotlinger *v.* Railroad, 11 Lea, 533; 81 Ill., 245; 49 Tex., 31; 76 Tex., 174; 47 N. W. Rep., 809.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County. J. W. BONNER, J.

BAXTER SMITH for Railroad.

E. R. THURMAN, J. W. MOORE, J. P. HICKMAN, and J. D. WADE for Hailey.

SNODGRASS, Ch. J. This is a suit for damages for injuries sustained on a freight train in Florida. There was a recovery of $1,000, and the defendant appealed in error.

The plaintiff, with others, applied, through one

*The risk assumed by a passenger on a freight train is the subject of a note to *Ohio Valley Railroad Co.* v. *Watson*, 19 L. R. A., 310.

of the party, for passage on a freight train, and was informed by the conductor that it was against the rules of the company to take passengers on that train without they had a permit from the superintendent; but, nevertheless, after so advising them, he took them on the train, and received fare from them as passengers, and they, being so advised, took passage in the caboose. This, with six other cars preceding it, was thrown from the track by a broken wheel, and the injury thus inflicted.

The Circuit Judge charged the jury that, if plaintiff obtained passage under these circumstanees, he was not entitled to all the rights of a passenger; but he did not tell them just what relation the plaintiff would occupy. He also refused to charge that the defendant owed plaintiff no other duty, under these circumstances, than not to willfully or intentionally injure him.

In both respects there was error. The Judge should have said to the jury that the regulation disallowing passengers on a freight train was a reasonable one, and the conductor of such a train, in the absence of assumed or proven authority, was not to be presumed as authorized to disregard it; and if it appeared in evidence that, instead of assuming such authority, the conductor in fact told plaintiff, or his representative making the contract, that he did not have it, and the plaintiff then induced him to take plaintiff on the train, in violation of such rule, and in disregard of his obligations to the

company, he did not thereby become a passenger, or entitled to the rights of a passenger, but was a trespasser, and took the risk of injury as such. This is the law according to the great weight of authority, and, manifestly, as a matter of reason and justice.

There is no evidence in the record as to what the law of Florida is, and therefore it is presumed to be the same as our own. The rule in this, as in many other States, is that, if one take passage on a train or in a car not provided for passengers, without being advised that he is not permitted to ride on such train or car, he may recover for injuries sustained as a passenger while so riding. *Washburn* v. *Railroad Co.*, 3 Head, 638. But the rule is different if he has no right so to believe, or is informed to the contrary. *Railroad Co.* v. *Meachem*, 7 Pickle, 428; *Trotlinger* v. *Railroad Co.*, 11 Lea, 533; *Railroad Co.* v. *Brooks*, 81 Ill., 245; *Railroad Co.* v. *Moore*, 49 Texas, 31; *Railroad Co.* v. *Campbell*, 76 Texas, 174 (13 S. W. Rep., 19); *McViety* v. *Railroad Co.*, 47 N. W. Rep., 809 (Minn.).

There are cases apparently holding the contrary. The first one is a Pennsylvania decision, under which a shipper was allowed to recover damages for injuries sustained while his freight car was attached to a passenger train, though the freight agent who made the arrangement with him for such shipment told the shipper, when the application was made,

that a rule of the company forbade it. The passenger train, to which the car of the shipper was subsequently attached, was not then present. When it arrived, however, the freight car was attached, and it thus appears that this action was sanctioned by the freight agent of the company, and all the company's representatives on the passenger train. Under such circumstances, the shipper might well have been assumed to have participated in no wrong, and no violation of the rules of the company. He had the right to ask the freight agent to attach his car to the passenger train, and, when the agent told him that the rules of the company forbade it, he could not know that, before the arrival of the passenger train, the agent might not have obtained the requisite authority to attach it, especially as he, subsequently, with the assent of the company's representatives on the passenger train, did do so. *Railroad Co.* v. *Chenerith*, 52 Penn., 382. Two other cases cite this one with approval: *Creed* v. *Railroad Co.*, 86 Penn., 139; *Dunn* v. *Railroad Co.*, 58 Maine, 187; 4 Am. Rep., 267. But they are both cases in which the passenger does not appear (as in the case before us) to have been told that he was riding in violation of any rule of the company, and, therefore, do not fall within the rule attempted to be deduced from the first Pennsylvania case, but are properly decided under all the cases, and are in strict accord with that herein laid down. If the case in 52 Pennsylvania be, however, treated as authority there,

for the proposition that a recovery can be had for an injury sustained by one riding on a freight train by inducing a conductor to violate a known rule of the company, of which the conductor at the time informs him, it will not be so treated here, as it is contrary to the former holdings of this Court, and to the general current of authority.

The judgment must, therefore, be reversed and the case remanded for a new trial.

RAILROAD *v.* BEAN.

(*Nashville.* February 7, 1895.)

ABATEMENT. *Of actions for injuries causing death.*

A suit for the wrongful killing of a decedent, brought pursuant to our statutes, by his administrator for the sole benefit of the widow, there being no surviving children, abates upon the death of the widow, occurring even after judgment below and pending appeal in this Court. Such suit cannot be revived or prosecuted after the widow's death for the benefit of the father of the deceased, or of others standing next in the line of succession.

Code construed: §§ 3130, 3132 (M. & V.); § 2291 (T. & S.).

Cases cited and approved: Webb *v.* Railway Co., 88 Tenn., 128; Railroad *v.* Pitt, 91 Tenn., 86; Loague *v.* Railroad, 91 Tenn., 458; Greenlee *v.* Railroad, 5 Lea, 418; 28 Minn., 371.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County. N. D. MALONE, Sp. J.

BAXTER SMITH for Railroad.

STEGER, WASHINGTON & JACKSON for Bean.

MCALISTER, J. This action was commenced in the Circuit Court of Davidson County by George Bean, administrator of Frank Murray, deceased,

against the Louisville & Nashville Railroad Company, to recover damages for the negligent killing of plaintiff's intestate.

It appears from the record that, at the *locus in quo* of the accident, the defendant company had constructed two parallel tracks. The deceased, when first seen, was walking on the main line towards Nashville, but, as a train approached him from the city, he crossed over, and, continuing his journey, walked on the cross-ties of the Southeastern track, when he was overtaken and killed by a freight train, which was likewise moving in the direction of Nashville. The claim of plaintiff is that the deceased was in full view of engineer and fireman for a half mile, and was actually seen by the engineer, but that, in consequence of the negligence of the engineer and fireman in failing to comply with the statutory precautions, plaintiff's intestate lost his life.

The company pleaded the general issue, and also a special plea of accord and satisfaction, in which it was averred that, prior to the institution of this suit by the administrator, the widow of said intestate, in consideration of one hundred dollars, to her paid by defendant, and the further promise by defendant to pay the expense of the burial and funeral of the said Frank Murray (which account, amounting to $118, has since been paid), compromised and settled any and all claims against defendant growing out of said killing.

The plaintiff filed a replication to this plea, aver-

ring that said Mary Ann Murray was insane at the time of the alleged accord and satisfaction, and at the time of the payment of said one hundred dollars, and at the time of the payment of the said burial and funeral expenses of the said Frank Murray, and that plaintiff now tenders and pays into the hands of the clerk said one hundred dollars and the amount of said burial and funeral expenses. Plaintiff also averred that said accord and satisfaction was obtained by fraudulent constraint upon said Mary Ann Murray; that said Mary Ann Murray did not know the contents of said release at the time her signature to it was obtained, and that said defendant's agents fraudulently represented to her that the company was not liable for the killing of her husband, and that the said money was handed her as a gift or gratuity.

Defendant company joined issue on said replication. The jury, under the charge of the Court, returned a verdict in favor of defendant. Motion for a new trial having been overruled, plaintiff appealed and has assigned numerous errors, especially upon the charge of the Court. In the view we have taken of the case, these assignments have now become unimportant, and will not be considered. The determinative question in the case arises upon the motion of defendant's counsel to abate the suit on account of the death of Mary Ann Murray, which has occurred since the appeal to this Court. The present suit was instituted by the administrator, and

the widow of said intestate (to wit: the said Mary Ann Murray) was named as the beneficiary in the plaintiff's declaration. The deceased left surviving him no children, and his father, Benjamin Murray, is his next of kin. The question now presented, probably for the first time in this State, is whether, upon the death of the widow, the suit abates, or can the administrator still prosecute it for the benefit of the father, who is the next of kin of plaintiff's intestate? The question, when laid in a narrow compass and reduced to its ultimate analysis, is, whether the right of action survives and is limited to those entitled to the recovery at the death of the deceased, or whether, upon the death of those then entitled, the cause of action survives and revests in the next of kin in the line of distribution. The settlement of this question depends upon a proper construction of the following sections of the Code (M. & V.), to wit:

"3130. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate, or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow, or next of kin, free from the claims of creditors.

"3131. The action may be instituted by the per-

sonal representative of the deceased, but, if he decline it, the widow or the children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his name to the prosecution bond.

"3132. The action may also be instituted by the widow in her own name, or, if there be no widow, by the children."

It was held by this Court, in *Webb, Adm'r*, v. *Railway Company*, 88 Tenn., 128, that, under these statutes, the administrator is in fact a nominal plaintiff, the recovery being for the benefit of the widow and children; and, we may add, if there be no wife or children, the suit is commenced by the administrator for the benefit of the next of kin.

Mr. Wood, in his work on Railroads, Vol. 3, Sec. 410, in commenting upon similar legislation, says: "As the remedy exists, and is created, only by statute, it follows that it can only be pursued in the mode and under the conditions specified therein, and for the benefit of the persons named therein. * * * If the damages recovered are for the benefit of the husband, widow, parent, or next of kin, the declaration must allege the fact, and the existence of such beneficiary, for, if no beneficiary survives the deceased, no recovery can be had." Sec. 413; *Schwarz* v. *Judd*, 28 Minn., 371.

To the same effect are our own cases. Judge Caldwell, speaking for the Court in *Railroad* v. *Lilly, Adm'r*, 90 Tenn., 565, said: "The statute virtually creates a liability in favor of the widow or next of kin, which did not exist at common law, hence, the Courts will not extend or enlarge that liability by liberality of construction, but will confine it to cases clearly within the provisions of the Act. No right of action will be inferred, no remedy will be given, in favor of any person except those distinctly contemplated as beneficiaries." In that case, the administrator sued without alleging the existence of any statutory beneficiary. The Court held, on demurrer, that such omission in the declaration was fatal to the right of action. *Railroad* v. *Pitt, Adm'r*, 91 Tenn., 86.

Still another phase of this statute arose in the case of *Loague, Adm'r*, v. *Railroad*, 91 Tenn., 458. That suit was brought by the widow of Jno. W. Curry against the railroad company for the negligent killing of her husband. Pending the suit, the widow died, and John Loague, her administrator, moved the Court to permit him to revive the suit in his name. The motion was disallowed by the Circuit Court, and its action was affirmed by this Court. Judge Lurton, delivering the opinion of the Court in that case, said, viz.: "It would seem to follow, therefore, that these statutory damages can only be recovered in the mode prescribed by the statute. The widow may prosecute the suit, but, if there be no widow,

or she die pending the suit, in whose name may the suit be then prosecuted? The statute answers the first inquiry. The widow alone has a right to sue in the first instance. The children have the right only when there is no widow. Citing *Greenlee* v. *Railroad*, 5 Lea, 418. * * * The statute does not provide that the suit of the widow may be prosecuted by her personal representative. The right to conduct such a suit by the widow depends on the statute. The right of action being given only by the statute, must be prosecuted according to its provisions."

These cases illustrate the strict construction given this statute by our predecessors, and very properly limit the mode of procedure, as well as the beneficiaries, to the four corners of the statute. The precise question, however, we are now called on to adjudicate did not arise in those cases, or in any other reported case of which we are apprised. The present suit was properly brought in the name of the administrator of Frank Murray, deceased, and, there being no children, the wife was designated in the declaration as the statutory beneficiary. The wife, at the date of the killing of deceased, when the cause of action accrued, was the sole beneficiary, and the right of action was not extinguished by the death, but passed to the widow. It is true the deceased left surviving him a father, brothers and sisters, nieces and nephews; but the right of action passed solely to the widow, or to

the administrator for her exclusive benefit, and the next of kin mentioned were not entitled to any part of the damages which might be recovered. The widow having died, the question now to be determined is, whether the suit abates, or whether the administrator may still prosecute it for the benefit of the father of deceased, who is the next of kin now surviving. We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery at the death of deceased, when the cause of action accrued. In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator for her benefit. The right of recovery having once vested in the widow, it did not pass, upon her death, to her personal representative; neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished. Should this suit be revived and prosecuted to a successful termination, to whom will the recovery be paid? It is answered, to Benj. Murray, the father of deceased, and, in the event he should die, to the brothers and sisters. We say not, for the reason the right of action did not survive or pass to any of these beneficiaries. Had there been no widow and children at the death of the intestate, the right of action would have

passed to the father, or, rather, to the personal representative for the benefit of the father; or, in the event the deceased left no father surviving him, the suit would be prosecuted for the benefit of the next of kin living at the death of deceased. The right of action, however, does not pass to any person or survive to any beneficiary excepting those appointed in the statute as entitled to the recovery when the cause of action accrued.

The suit having abated, the same is dismissed, with costs.

NUNNELLY *v.* SOUTHERN IRON CO.

(*Nashville.* February 9, 1895.)

1. STATUTE OF LIMITATIONS. *Filing plea on trial discretionary.*

It is matter of discretion whether the Court will permit filing of plea of the statute of limitations after the trial has begun. (*Post*, *pp.* *401*, *402.*)

2. LICENSE. *Distinguished from easement—example.*

The privilege to discharge water from ore washers into a stream, given without words of grant by a lower proprietor to an iron company as long as it "may wish to run, or have run," said washers, with an agreement to accept a certain sum as the full amount of damages done by such water, is a license personal to the licensee, not an easement, and does not pass to the grantees of such iron company. (*Post*, *pp.* *408–412.*)

Cases cited: 32 N. J. Eq., 254; 5 Wall., 599; 30 Am. Dec., 60; 27 Am. Dec., 675; 57 Am. Dec., 287; 2 Am. L. Cases, 506.

3. ESTOPPEL. *License does not create.*

A mere license cannot operate to estop the licensor in favor of the licensee, because an estoppel must be mutual. (*Post*, *p.* *412.*)

4. EASEMENT. *Contract creating is within statute of frauds.*

An instrument creating an easement is within the operation of the statute of frauds, and must, therefore, contain a sufficient description of the premises in which the easement is granted. (*Post*, *p.* *413.*)

5. CORPORATIONS. *Liability of officers for nuisances.*

The president and general manager of a corporation are personally liable, with the corporation, for damages caused to a riparian proprietor by the long continued discharge of muddy water into a stream, from ore washers operated by the company

with their sanction and their knowledge of the damages caused thereby. (*Post, pp. 414-419.*)

Case cited: 54 Am. Rep., 231.

FROM HICKMAN.

Appeal from Circuit Court of Hickman County. W. L. GRIGSBY, J.

PITTS & MEEKS for Nunnelly.

W. P. CLARK, STEGER, WASHINGTON & JACKSON, and JACOB LEECH for Southern Iron Co.

E. H. HATCHER, Sp. J. The plaintiff, W. S. Nunnelly, sued the defendants, the Southern Iron Company, the Warner Iron Company, J. C. Warner, and Percy Warner, in the Circuit Court of Hickman County for $5,000, as damages alleged to have resulted to the plaintiff by reason of certain nuisances alleged to have been maintained by the defendants. The declaration, and as amended, contains three several counts. In the first it is alleged that the defendants, for several years prior to the bringing of this suit, and at the time thereof, were operating, just east of and near to the premises of plaintiff, an establishment for mining iron ores, which are cleansed by means of certain machines, into which large quantities of water were conveyed through

pipes from Mill Creek; that the clay and dirt, thus separated from the ores, were carried off with the water in an artificial stream through the premises of plaintiff, near by and past his residence, storehouse, and springs, into Piney River, and thence on through said premises, polluting the waters of the river and of the springs, depositing large quantities of barren clay and mud in the bed of the river, filling up the fords thereof so as to render them impassable during the seasons of high water, preventing the customers of plaintiff from coming to his mercantile store, and thus damaging his trade; that when said river overflows its banks, this sterile dirt and clay are carried out and distributed over the alluvial lands of the plaintiff adjacent to the river, lessening its productiveness and otherwise injuring it; that the cattle of plaintiff were killed by getting mired up in this sticky deposit, and that the fish in said stream were destroyed by means of the flow of said waste matter therein, etc.

The second count seeks to recover for alleged damages resulting from defendants' operating alcohol works on Birds' Creek, near to and east of the farm of plaintiff, which creek flows across the southern end of said farm into Piney River, and from the waste materials and noxious odors from these alcohol works being discharged into said creek, and thence into Piney River, polluting these streams as well as his spring.

The third count seeks to recover for an alleged

nuisance of a similar kind, situated on Mill Creek, which flows into Piney River north of and above the farm of plaintiff, into which creek, as it is alleged, are discharged similar waste products and foul odors from alcohol works on Mill Creek, which floats these noxious materials and odors into Piney River, through the premises of plaintiff; it being averred that these alleged odors and waste products corrupted the waters of Piney River, destroyed the fish therein, and ruined plaintiff's spring. To the declaration the defendants jointly filed four pleas, the first being the general issue, the second was one of accord and satisfaction as of July 30, 1887, and the third of an accord and satisfaction as of February 25, 1887, by the Standard Charcoal Company, which, it was averred, operated as an easement, and that this easement was assigned by the Standard Charcoal Company to The Warner Iron Company. The fourth plea sets up an estoppel by virtue of a certain written instrument, executed by the plaintiff on the thirtieth day of July, 1887, the tenor of which will be noticed hereafter. Issue was joined upon the first, second, and third pleas, but the fourth plea was demurred to by plaintiff for the reasons which will be discussed later on. His Honor, the Circuit Judge, sustained this demurrer and ordered this fourth plea to be stricken out. The Warner Company and the Southern Iron Company each filed an additional separate plea. That of the Warner Company avers that L. H. Nunnelly, plaintiff's ancestor,

in December, 1880, leased to one Goodrich, for a period of sixteen years, the ore banks described in the declaration, for the purpose both of mining and of washing ores, and that on the nineteenth day of February, 1884, said L. H. Nunnelly signed a written permission to flow mud, water, and dirt through his lands in question; that Goodrich conveyed this lease to the Warner Iron Company before this suit; that since the execution of said lease, plaintiff inherited said premises by the death of said L. H. Nunnelly, and that, on July 30, 1887, plaintiff, by written instrument, gave to the Warner Company the right to flow muddy water from the washing of said ores, which written instrument, it is averred, was to be in full satisfaction of all damages complained of in the declaration.

The additional or fifth plea of the Southern Iron Company alleges that, on December 26, 1889, G. M. Fogg and others, as trustees of the Warner Iron Company, sold to the Southern Iron Company all of its property, franchises, easements, licenses, and contract rights in Hickman County, among which was the written agreement referred to in the foregoing plea of the Warner Iron Company, and that this contract was executed as full satisfaction of the injuries complained of.

There was replication to these two pleas and issue thereon. The cause was heard by the Circuit Judge without the intervention of a jury, and after examination of plaintiff as a witness had begun,

and more than sixteen months after the filing of the first four pleas, counsel for defendants presented a sworn plea of the statute of limitations of three years, and in an affidavit assigned his reasons for not sooner presenting said plea. Upon objection from plaintiff's counsel, the Circuit Judge declined to permit this plea to be filed, because no sufficient excuse was given for the delay, to which action of His Honor defendant's counsel excepted.

The record discloses the following undisputed facts: The plaintiff is the owner of a valuable farm of about 1,800 acres in Hickman County, which he cultivates, and on which he has a mercantile store, and through which farm flow three streams—Piney River, Tanyard Branch, and Bird's Creek. Piney River flows through the entire width of this farm, from north to south; Tanyard Branch and Bird's Creek are both tributary to Piney River from the east, and flow through a portion of this farm, the former through the northern or upper, and the latter through the southern or lower part thereof. On the farm, and near these streams, are several valuable springs of clear, pure water. Plaintiff and his sister jointly inherited this farm upon the death of their father, L. H. Nunnelly, and plaintiff bought his sister's interest therein. In 1880, L. H. Nunnelly, plaintiff's father, leased to one Goodrich fifty acres of this farm lying on the east margin thereof, and near to Tanyard Branch, for the purpose of mining iron ore and other minerals therefrom, with

the exclusive right of so doing for a period of sixteen years. This lease was signed by the plaintiff also, and was duly registered. The consideration for the lease was that the lessor was to receive one tenth of the ores and minerals taken from the land, or the cost of mining and delivering same at the shaft in shipping condition. Goodrich transferred this lease to the Warner Iron Company, who began mining operation about 1882 or 1883. The Warner Iron Company owned lands adjoining this fifty acre tract thus leased from plaintiff's father, and most of the iron ore mined came from about ten acres of this land belonging to said company.

At first, the ores were separated from the clay and dirt by screens and sieves, and these waste materials were not carried off; but about 1884 the Warner Iron Company laid pipes, by means of which water was conveyed from Mill Creek to these mines, a distance of about one and a half miles. Washing machines were then put up on the lands of the Warner Iron Company, into which the ores were placed, and then separated from the dirt and clay by the water from said pipes. This water, after thus washing the ores, was discharged, with the mud and clay, into Tanyard Branch, from whence it flowed through plaintiff's premises into Piney River, and on down the river through said premises. Tanyard Branch is the only natural outlet by which this muddy water and waste materials can be flowed from these mines at Nunnelly ore banks. The muddy

water, dirt, and clay, which were carried from the washing machines, caused heavy deposits of mud and sticky clay to settle in the beds of the branch and river, and, in seasons of high water, when the streams overflowed their banks, this mud and clay were washed out and over upon the adjacent alluvial land of plaintiff, and deposited thereon, as well as upon the road leading through his farm, by means of which road some of his customers usually came to his store to trade. Plaintiff's stock frequently mired up in this sticky deposit on his lands, and some of said stock were thus lost, though the value thereof is not shown. Some of this muddy water and waste matter inundated his springs. After the Warner Iron Company had thus operated its washing machines from five to seven years, said company erected dams across the hollow near said machines, which dams intercepted the mud and clay washed from the ores, and thus permitted only clear water to flow through plaintiff's premises. As long as these dams were kept in good repair, no injury was caused from the washing of the ores.

The Warner Iron Company owned and operated certain alcohol works on Mill Creek, for the manufacture of wood alcohol. Mill Creek flows into Piney River about two miles north of and above said farm of plaintiff. The waste matter and disagreeable odors from these alcohol works were discharged into Mill Creek, which carried them into Piney River, and through said farm, impregnating the waters of the

river and spring of plaintiff with said odors and waste products.

In 1881, the Standard Charcoal Company, not sued herein, erected similar alcohol works on Bird's Creek, just east of and above plaintiff's farm, from which works similar waste products and odors were discharged into said creek, which floated them along the creek and into Piney River, through plaintiff's farm, and impregnated these streams and a spring on said farm with said odors and waste matter. In the latter pnrt of 1888, the Standard Charcoal Company sold these last named alcohol works to the Warner Iron Company, which latter company operated them until December, 1889, at which time the Warner Iron Company conveyed all of its property, franchises, licenses, easements, etc., in Hickman County to G. M. Fogg *et al.*, trustees, which trustees sold the same in January, 1890, to the Southern Iron Company. There is considerable conflict in the proof as to the effect of the waste matter and deposits upon the waters of the streams and springs, and upon the fertility of the soil, and whether the fish in the streams were or not driven therefrom by the discharge from the ore washers and alcohol works; and, in fact, there was conflict in the proof as to nearly every element of alleged damage.

His Honor, the Circuit Judge, after hearing the evidence, rendered judgment in favor of plaintiff and against the two defendant corporations, as follows: That the Warner Iron Company, by reason of the

flow of the refuse and offensive matter down Bird's Creek, and into plaintiff's spring, drinking and stock water, is liable to him in the sum of $100, and in the further sum of $500 as damages caused to plaintiff by the deposit of red mud upon his bottom lands. His Honor further adjudged that the Southern Iron Company was liable to plaintiff in the sum of $1,000 as damages resulting from the deposit of mud from the washers upon plaintiff's bottom lands, and in the fords of the creek. He held that the proof failed to show that J. C. and Percy Warner were active participants in the nuisances in such a manner as to render them personally liable, and he therefore dismissed the suit as to them. He further held that the various written instruments plead and relied on by defendants as defenses to this suit were mere licenses, which could afford no protection to the transferees thereof, but expired at the several dates of their respective transfers. The plaintiff and defendants both appealed in error, and both parties have assigned errors.

Passing by the probably improper joinder of the two defendant corporations for torts which the proof disclosed to be separate and independent of each other, such supposed misjoinder not being raised by counsel, we pass to the consideration of the questions raised by the pleadings and the assignments of errors.

The verdict of the Circuit Judge is abundantly sustained by the evidence, in so far as the amount of damages awarded is concerned; and, under the

rule of this Court, the judgment will not be disturbed unless there be some error in the record. The filing of the plea of the statute of limitations by defendant was in the sound discretion of the Circuit Judge, and the record fails to show that this discretion was improperly exercised. It was therefore not error to refuse to permit this plea to be filed.

The plaintiff was permitted to testify, over objection of defendants' counsel, as to his estimate of the value of the fishing privilege to his farm. Even if this were error, it was entirely harmless, for the reason that the damage to the fishing privilege formed no part of the recovery against defendants.

To the question urged with so much earnestness and ability by counsel for defendants, that there was an easement of necessity to flow these waste materials from the mining products growing out of the original lease, and out of the fact that Tanyard Branch was the only natural outlet by which these waste materials could be flowed from the mines, it is sufficient to say that neither the pleadings nor the assignment of errors raise this question. Besides, it is in proof, and undisputed, that when the lease was executed, and for a year or two thereafter, the dirt and waste materials were not separated from the ores by the washing or hydraulic process, but by means of screens and sieves, and the waste was then left on the grounds. His Honor might, therefore, have been warranted in the conclu-

sion that the parties did not contemplate the necessity of flowing these waste materials through the premises in question at the time the lease was executed.

Counsel for defendants insist, also, in argument, upon an equitable estoppel, created, as they insist, by the conduct of plaintiff and his ancestor in encouraging a large expenditure of money in the erection of the plant, and laying of pipes to convey water with which to wash the ores. But, as before stated, there is evidence, undisputed, tending to show that the parties did not contemplate, at the time of the lease, that the ores would be separated from the dirt and clay by means of water, which would have to flow through said natural outlet; nor is there any proof whatever that plaintiff, or his ancestor, ever encouraged, directly or indirectly, the investment of money in providing means by which to cleanse the ores by the washing or hydraulic process. Nor, indeed, do either the pleadings or the assignment of errors rely upon such an equitable estoppel.

This brings us to the remaining and vital questions involved in this lawsuit:

1. Were the several written instruments plead and relied on by defendants mere licenses, personal to the licensees, and not assignable, but revoked or expired when transferred by the licensees? Or did they create such essential and permanent rights as to be in the nature of easements running with the realty, and assignable so as to operate as a protection to the assignees thereof?

2. Did the several instruments offered in evidence sustain the pleas of accord and satisfaction?

3. Are J. C. and Percy Warner liable in this action?

The distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. As said by the Vice Chancellor, in *East Jersey Iron Co.* v. *Wright*, 32 N. J. Eq. Rep., p. 254: "The adjudications upon this subject are numerous and discordant. Taken in their aggregate, they cannot be reconciled; and, if an attempt should be made to arrange them into harmonious groups, some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification." But there are certain fundamental principles underlying most of the cases, which enable Courts to distinguish an easement from a license, when construed, as all instruments must be, in the light of surrounding circumstances. Mr. Washburn defines a license as "an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein." He defines an easement as follows: "An easement implies an interest in the land, which can only be created by writing, or, constructively, its equivalent —prescription. A license may be created by parol. * * * It matters not whether the license be oral or in writing, in respect to its being parol, if the paper giving it have no requisites of a grant."

1 Washburn on Real Property, *9, 398. Again he says: "So long as a license is executory, it may be revoked at the pleasure of the licensor." To the same effect are Washburn on Easements and Servitudes, p. 6; *De Haro* v. *United States*, 5 Wall., 599; 3 Kent's Com., p. *453; Gould on Waters, Secs. 322, 323; 1 Warvelle on Vendors, pp. 43, 44; 1 Sugden on Vendors, p. 177.

The discussion of licenses, in a large number of the cases and authorities, grows out of licenses created by parol. Some of them hold such licenses to be revocable, even when a consideration is paid therefor; otherwise, it is said, they would defeat the operation of the statute of frauds. See *Mumford* v. *Whitney*, 30 Am. Dec., 60; *Prince* v. *Case*, 27 Am. Dec., 675; *Conles* v. *Kidder*, 57 Am. Dec., 287. But there are other cases which hold that even parol licenses, without consideration, are not revocable when executed; and some of these authorities go to the extent of holding that such executed licenses are assignable. All of such authorities as hold such licenses irrevocable and assignable, treat them as in the nature of equitable estoppels. See the extensive notes to *Rerick* v. *Kern*, 2 Am. L. Cases, 506, where the subject is exhaustively treated.

It is universal, however, both upon principle and authority, that it requires words of grant to create an easement or a permanent interest in realty; and it is equally obvious that, in construing instruments of all kinds, the object of the Court should be to

ascertain the purpose and meaning of the parties thereto.

With the above definitions and principles in view, let us examine the written instruments relied upon by defendants to defeat this action. All of them were properly acknowledged and duly registered. The first is the one executed July 30, 1887, by the plaintiff alone, and is relied upon in defendant's fourth plea as an estoppel, and it is copied in full in the plea. It recites that, for the sum of $500, "I, W. S. Nunnelly, have bargained and agreed, and do hereby bind myself, to allow the Warner Iron Company to pass the muddy water from their washers at Nunnelly ore banks by and through my farm and premises as long as said Warner Iron Company may wish to run, or have run, said washers. I further agree and bind myself to accept $500 as full amount of damages done or that may hereafter be done, except in the case of a large spring at lower end of said Nunnelly's farm should be damaged by the settlings of, and mud from, said washers, then said Warner Iron Company agree and bind themselves to remedy such damages by building a stone or brick wall, so as to protect said spring from the settlings of mud from the washers. It is further agreed by the Warner Iron Company that if any of Nunnelly's stock should get mired in the mud settlings on the river or sloughs passing through Nunnelly's farm, and should be a loss to him, then the Warner Iron Company is to be responsible for

such loss. It is fully agreed and understood that the above $500 is for damages to the branch that passes my farm, and not for damage done in the river, except the above named damage."

This plea was demurred to because the instrument relied on was insufficient as an estoppel, because it shows upon its face that it applies to the damages in the branch, and not to Piney River, and does not protect the assignees or the other defendants. The Court sustained this demurrer, and, we think, properly.

The instrument contains no words of grant, and, by the express terms thereof, it is limited to the Warner Iron Company only so long as said company shall run or have run the washers in question: so that, by the very terms of the instrument, the license would terminate whenever the Warner Iron Company placed it beyond its power to further operate these washers, or to have them operated. Nor could this instrument operate as an estoppel. It is a cardinal principle of the law of estoppels that they must be mutual to be effective for any purpose. 2 Herman on Estoppel, Secs. 793 and 889. At Section 772 it is said: "The rule requiring reciprocity in cases of estoppel necessarily requires that a lease shall be by indenture, and not by deed poll; for both the lessor and lessee must be bound, or neither." See also the cases cited in 2 Milliken's Digest, 1348. Nor do we think that the damages which were paid for, as recited in this in-

strument, covered or referred to those sued for in the declaration, and therefore did not operate as an accord and satisfaction thereof, as relied upon in the third and fifth pleas.

Counsel for defendants earnestly insist that this instrument created an easement. In this view we cannot concur. An easement is an interest in land —an incorporeal interest, it is true, but an interest, nevertheless—and is within the operation of the statute of frauds. 3 King's Tenn. Digest (2d Ed.), p. 1848, Sec. 27, and cases cited. There is no description whatever in this instrument of any realty; not even the State or county of its location is given, no metes or bounds or limits.

The next instrument relied upon by defendants to defeat this action is, also, one set up in the fifth plea of the Warner Iron Company, to wit: the one executed by L. H. Nunnelly, on February 19, 1884. This instrument was signed by L. H. Nunnelly alone, and stipulated that, for certain considerations, the Warner Iron Company was to have a water way for flowing off the mud, etc., through Nunnelly's lands, and provides for arriving at the measure of any damage to his land by arbitration. This instrument, although called, in the fifth plea, "a written permission to flow muddy water and dirt" through Nunnelly's land, yet, by a fair construction of the whole plea, it sufficiently relies upon this instrument as conferring an easement to the Warner Iron Company to flow the muddy water and dirt through Nunnelly's farm. But

it is ineffectual as a bar to this suit, for several reasons: as a conveyance of an easement in realty, it contains no description whatever of the land upon which the easement is to be fastened; as an agreement to submit to arbitration the measure of damages, it is not sufficient, for the reason that it does not bind the Warner Iron Company, nor was it relied upon in the pleadings for this latter purpose.

We are of opinion that the instrument of February 25, 1877, executed by W. S. Nunnelly to the Standard Charcoal Company, is sufficient to create an easement. It locates the realty as being in Hickman County, Tenn., adjacent to the works of the Standard Charcoal Company. It identifies the easement granted by limiting it to the channel of Bird's Creek. It contains express words of grant, and grants the easement "for all future time," and is supported by a valuable consideration. This instrument was relied on in the third plea as an accord and satisfaction, and, also, as an easement passing by transfer from the Standard Charcoal Company to the Southern Iron Company, and is, we think, a sufficient bar to any recovery for the injuries resulting from the alcohol works on Bird's Creek, and which injuries the Circuit Judge found to amount to $100.

The Circuit Judge held that defendants, J. C. and Percy Warner, were not active personal participants in the nuisances so as to make them personally liable. The only proof in the record as to the connection of these defendants with the wrongs com-

plained of, is to be found in the testimony of plaintiff and J. B. Thompson, a witness called by plaintiff. Plaintiff testified that J. C. Warner was president of the Warner Iron Company, and also of the Southern Iron Company for a short while after the latter company had purchased the properties of the former company. Mr. Thompson also testified that J. C. Warner was the president of the Warner Iron Company; and the plaintiff understood that J. C. Warner was a director and one of the largest stockholders of the Southern Iron Company. He testified that Percy Warner was the general manager of both companies; that he was frequently at the washer plant at Nunnelly ore banks, and took an active part in the operation of said washer. He further testified that both J. C. and Percy Warner—father and son—knew these works were going on, and that he, the plaintiff, frequently talked with both of them about these works, and urged them to put in the dams before they were in fact put in, and offered to give, without charge, the privilege of erecting them across the hollow on his land, if they would put them in and stop the flow of mud onto his farm. It was also in proof, as already shown, that these washers were operated from five to seven years before any dams were built, and that the dams, when built and in repair, prevented the mud and waste products from flowing down upon plaintiff's farm. J. B. Thompson, on cross-examination, says: "The Warners

only acted as officers. I never knew them to do anything as individuals."

When a person enters into a contract with a corporation, through its agents or officers, fairly and in good faith, there can, under no circumstances, any liability attach to such agents or officers in respect to the contract, unless so stipulated. In such a case, the person gets just what he bargained for, a liability against, or a contract with the corporation alone. But the torts or wrongs of corporations, through its agents or officers, are governed by an entirely different principle of law. If the agent of a corporation, or of an individual, commits a tort, the agent is clearly liable for the same; and it matters not what liability may attach to the principal for the tort, the agent must respond in damages if called upon to do so. This principle is absolutely without exception—is founded upon the soundest legal analogies and the wisest public policy. It is sanctioned by both reason and justice, and commends itself to every enlightened conscience. To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations. It would serve to stimulate the zeal of responsible and solvent agents of irresponsible and insolvent corporations in their efforts to repair the

shattered fortunes of their failing principals upon the ruins of the rights of others. Says Mr. Morawetz: "The agents of a corporation are clearly liable for their tortious acts; they are therefore liable for any injury to the property of others, * * * and the liability is entirely independent of any liability which the company may have incurred." 1 Morawetz on Corporations, Sec. 569.

To the same effect is 1 Waterman on Corporations, p. 415, where it is said: "The directors of a gas company were held liable for a nuisance created by the superintendent and engineer under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and, though such plan was a departure from the original and understood method, which the directors had no reason to suppose had been discontinued."

In Wood on Nuisances, Sec. 824, it is said: "If the nuisance complained of is created by a corporation, the corporation and such of its officers as have the direction and control of its business, as well as its agents or servants who contributed to the nuisance, may be jointly sued or indicted therefor." It will be seen that this author predicates the liability of the officers who have the direction and control of its business, upon the presumption alone that such officers know of and sanction the nuisance; whereas, the liability of the inferior agents or servants is founded upon their participation in the acts creating the nuisance. See, also, 1 Beach on Pri-

vate Cor., Sec. 266; Thompson on Liability of Officers and Agents, pp. 351, 355; Mechem on Agency, Sec. 182; *Peck* v. *Cooper*, 54 Am. Rep., 231.

The proof is uncontradicted that J. C. and Percy Warner, the president and general manager of these defendant companies, knew of the operation of these works. One of them took an active part in the operation of the washer at Nunnelly's. Plaintiff talked to these gentlemen frequently about the matter, and urged them to put in dams to protect his property from the flow of these noxious deposits. In examining the question of the liability of J. C. and Percy Warner, we do not find a case of a single and isolated act of negligence or misfeasance. The rights of this plaintiff were continuously ignored for years. We cannot doubt, from the proof in this record, that both these gentlemen knew for a long time that the operation of these works was continually causing injury to plaintiff's property, and that for years they permitted this injury to go on without any effort to provide means to avoid it. It is true, Mr. Thompson says they acted only as officers, and not as individuals. This was but the mere statement of a legal conclusion; and, even if it were literally true, it would not serve to protect them from liability for torts committed by them as such officers. The Court is, therefore, of opinion that there is no evidence in the record to sustain the finding of His Honor, the Circuit Judge, in favor of the defendants, J. C. and Percy Warner.

The Court, therefore, holds that these gentlemen are liable to the plaintiff, jointly with the Warner Iron Company, for the sum of $500 in respect to the damages awarded by His Honor, the Circuit Judge, against the Warner Iron Company, for the deposit of mud upon plaintiff's bottom lands, and that they are liable, jointly with the Southern Iron Company, in the sum of $1,000 in respect to the damages awarded against the Southern Iron Company.

WALTON *v.* GAINES.

(*Nashville.* February 14, 1895.)

1. INFANT. *Disaffirmance of infant's deed.*

Privies in blood, but not privies in estate, may disaffirm an infant's voidable deed.

Cases cited: McGan *v.* Marshall, 7 Hum., 120; Robinson *v.* Coulter, 90 Tenn., 705; Matherson *v.* Davis, 2 Cold., 443; Scott *v.* Buchanan, 11 Hum., 467; Dodd *v.* Benthal, 4 Heis., 609.

2. SAME. *Disaffirmance when two disabilities concur.*

Where the disabilities of infancy and coverture concur at the time of the execution of the deed or mortgage, the right to disaffirm continues until after both disabilities are removed.

Cases cited: Scott *v.* Buchanan, 11 Hum., 467; Dodd *v.* Benthal, 4 Heis., 609.

3. SAME. *Void affirmance.*

A married woman cannot, after attaining her majority, affirm her deed made while she was an infant *feme covert* by an instrument which is not executed in conformity to the statutes regulating the conveyance of lands by married women.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.

J. C. BRADFORD, Sp. Ch.

J. C. MCREYNOLDS for Walton.

FRANK SLEMONS and E. A. PRICE for Gaines.

Walton *v.* Gaines.

BEARD, J. In July, 1887, Louise L. Gaines, being then a minor and a married woman, joined her husband in the execution of a mortgage conveying certain realty, constituting a part of her general estate, to secure one Watkins, complainant's intestate, in the payment of a note of $8,000. After reaching her majority, and while yet a *feme covert*, at the request of the mortgagee, and without any new consideration, she executed and delivered to him a paper, in the following words, to wit:

"I, Louise L. Gaines, being twenty-two years of age in November, 1889, and having signed certain notes and mortgage for $8,000 to William Watkins in 1887, when I was a minor, hereby take pride and pleasure in ratifying, affirming, and indorsing the said acts as fully as if I had been twenty-one years of age when I signed the same.

"(Signed) LOUISE LYTLE GAINES."

Soon after the execution of this paper, and while yet under the disability of coverture, Mrs. Gaines died, leaving surviving her an infant of twelve years. The bill in this cause was filed, among other purposes, to foreclose this mortgage, and this infant was made a defendant thereto. In the progress of the cause, a guardian *ad litem* was appointed for this minor, who interposed, for the protection of his ward, the infancy and coverture of the mother. The Chancellor decreed that the minor child had the right to disaffirm this deed, and dismissed the bill,

so far as it sought to subject the estate of this minor to the payment of the mortgage debt. The complainant has filed the record in this cause in this Court for writ of error, and has assigned for error the action of the Court below in thus dismissing his bill. That the mortgage of his real estate by a minor is not void, but only voidable, subject to be affirmed or disaffirmed by him after he reaches majority, is well settled in this State. *McGan* v. *Marshall*, 7 Humr., 120; *Robinson* v. *Coulter*, 6 Pickle, 705.

When the disabilities of infancy and coverture concur at the time of the execution of the deed, or mortgage, then the right to disaffirm continues until both disabilities are removed, without regard to the length of time which may elapse between the date of the instrument and the freeing of the grantor from these disabilities. *Scott* v. *Buchanan*, 11 Hum., 467; *Dodd* v. *Berthal*, 4 Heis., 609.

This right of disaffirmance of a voidable deed is so far a personal privilege of the minor that it does not pass to a privy in estate. But it is otherwise as to privies in blood. To appropriate the language of Tyler, in his work on Infancy and Coverture, p. 59: "As a general rule, no one but the infant himself, or his legal representatives, can avoid the voidable acts, deeds, and contracts of an infant, for, while living, he ought to be the exclusive judge of the propriety of the exercise of a personal privilege intended for his benefit, and when dead, they alone

should interpose who legally represent him. The rule would extend to privies in blood of the infant, but not to his assigns or privies in estate." To support his text, the author cites a number of authorities.

Such is the law of this State as is announced in the case of *Matherson* v. *Davis*, 2 Cold., 443. In that case, an infant *feme covert* joined her husband in a deed, which was executed and acknowleged by her as is required by the statutes of the State in the matter of the conveyance of a married woman's estate. She lived several years after attaining her majority, and then died while still a *feme covert*, leaving infant children surviving her. One of the questions in the case was, could these children disaffirm the deed of the mother? In answer to it the Court said: "During the life of the grantor, no one except the grantor, and, after his death, none but his heirs, can call the title in question on account of the infancy of the grantor at the time of the execution of the deed. And after the death of the grantor without having made the election, his heirs may do so, and thus affirm, or disaffirm, the deed, and their right to make such election may be exercised or waived in the same manner as by the grantor."

As to the ratification attempted by Mrs. Gaines in the paper indicated in the first part of this opinion, it is sufficient to say it was ineffectual to affirm the mortgage in question, if, indeed, it could be affirmed by her during coverture. Not only was

this paper without consideration, but it was very informal. If Mrs. Gaines could validly affirm during coverture (and this it is unnecessary here to determine), at any rate, she was, in the language of the Court in *Matherson* v. *Davis*, *supra*, "incapable of performing any act of affirmance in any other manner than in the mode provided by statute for the conveyance of real estate belonging to *femes covert.*"

The decree of the Chancellor, dismissing the bill so far as the minor's interest is concerned, is affirmed.

STRINGFIELD *v.* HIRSCH

AND

NEAL *v.* NEAL.

(*Nashville.* February 21, 1895.)

1. ATTACHMENT BOND. *Attorneys' fees not recoverable for breach of.*

Attorneys' fees, incurred in defending a wrongful attachment or injunction, are not an element of the damages that may be recovered for breach of an attachment or injunction bond. (*Post*, *pp.* 430–438.)

Cases cited and approved: Littleton *v.* Frank Bros., 2 Lea, 301; Williams *v.* Burg, 9 Lea, 456; Newman *v.* Washington, M. & Y., 79; Davenport *v.* Harbert, 1 Leg. Rep., 172; White *v.* Clack, 2 Swan, 231; 15 Wall., 211; 3 Dall., 306; 23 How., 2; 13 How., 370.

2. SAME. *Taxes not recoverable for breach of.*

Where a fund already in *custodia legis* is impounded by a wrongful attachment or injunction, the taxes accruing thereon pending the litigation, and paid out of the fund, are not an element of the damages that may be recovered for breach of the attachment or injunction bond. (*Post*, *p.* 438.)

3. SAME. *Receiver's compensation not recoverable for breach of.*

Where a fund already in *custodia legis* is impounded by a wrongful attachment or injunction, the receiver's compensation for loaning the fund pending litigation, which was retained out of the accruing interest, does not constitute an element of the damages recoverable upon breach of the attachment or injunction bond. (*Post*, *pp.* 438–439.)

4. SAME. *Joint judgment upon several bonds erroneous.*

Where several creditors successively attach, or otherwise impound, the same fund of their debtor, and give separate attachment or injunction bonds, they are not liable, upon dismissal of their suits, to a joint judgment for the damages resulting

from the wrongful prosecution of their attachment or injunction suits. (*Post*, *pp.* 439–441.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. J. A. CARTWRIGHT, Sp. Ch.

JAS. S. PILCHER for Stringfield, Einstein & Co.

CHAMPION, HEAD & BROWN and L. R. CAMPBELL for Etlinger & Co.

NATHAN COHN and STEGER, WASHINGTON & JACKSON for Fechheimer and others.

J. W. GAINES and E. A. PRICE for Mendil, Bremen & Co.

JOHN RUHM & SON for L. Jonas, David Lowenheim and T. C. Petri.

COLYAR, WILLIAMSON & COLYAR and J. S. PILCHER for Margaret G. Neal.

DANIEL & WATT for Henry E. Neal.

WILKES, J. On July 3, 1891, attachments were separately sued out in the Chancery Court of Davidson County by Jonas & Co., Lowenheim and Petri, creditors of I. Mihalovitch, and levied on a stock of goods as the property of I. Mihalovitch,

a resident of Cincinnati, O., but in possession of his son-in-law, Joseph Hirsch, in the city of Nashville. The Clerk and Master was appointed receiver, and took charge of the goods attached, and sold them, under the orders of the Court, on July 27, 1891, for $10,000, the sale being confirmed July 31, 1891, by the Court. After the property had thus been attached as the property of Mihalovitch, and placed in the hands of the receiver and sold, various creditors, some eleven in number, filed bills seeking to impound the proceeds of sale, alleging that Hirsch was the real owner of the property, and enjoining the paying over the proceeds to the creditors of Mihalovitch.

The bill of Stringfield, Einstein & Company was filed August 1, 1891, and is especially referred to as raising the issues in this case. The prayer of their bill was that enough of the proceeds of sale of the goods be impounded to satisfy complainant's debt. An order was granted, upon complainants giving bond in the sum of $1,000, conditioned to pay all damages for the wrongful procuring of the restraining order, that a sufficient amount of such proceeds be impounded to satisfy complainants' debt. Bond was given payable to Hirsch & Co., and other defendants, not naming them, but no injunction was issued in that special case. In other cases, creditors attached the proceeds as the property of Hirsch & Co., and enjoined Jonas, Lowenheim and Petri from receiving the proceeds of the sale. Answers

were filed, and an order was obtained dissolving the injunction and removing the restraining order upon the execution of refunding bonds, but, in the meantime, other bills attaching and impounding the funds and enjoining their payment, followed in rapid succession, so that the refunding bonds were never, in fact, executed, and the funds remained in the hands of the receiver and under the custody of the Court until final hearing, when the attachments were dismissed, injunctions dissolved, and impounding orders removed, so far as they interfered with Jonas, Lowenheim, and Petri, the Court holding their bills to be properly filed, and that the property should be applied to the debts of Mihalovitch, instead of to the debts of Hirsch & Co. The cause was appealed to this Court, and, at a former term, this Court dismissed the appeal, holding that Mihalovitch was a fraudulent vendee and Hirsch & Co. were fraudulent grantors; that, as between the creditors of the fraudulent vendee, Mihalovitch, and the fraudulent vendor, Hirsch & Co., the goods should go to the creditors of Mihalovitch, inasmuch as they were first attached as his property.

The cause was remanded to the Chancery Court to execute all unexecuted orders, and for a reference to the Clerk and Master to report the damages sustained by the wrongful suing out of the injunction writs and impounding orders. The Clerk and Master executed the order of reference, and reported as damages the following items:

Counsel fees in securing dissolution of injunction and impounding orders	$250 00
Taxes for 1892 and 1893 on fund impounded	120 00
Costs incurred under injunction and impounding proceedings	11 40
Commissions to receiver on impounded fund loaned out to attaching creditors	68 70
Total	$440 60

Exceptions were filed to this report, but the account was finally confirmed, and it was decreed by the Court that Petri, Jonas, and Lowenheim, attaching creditors of Mihalovitch, recover of the complainants, who attached as creditors of Hirsch & Co., and the sureties on their bonds, the amount of $440.60 and costs, for which execution might issue. The decree further provided: "But as between said original complainants, the Court is of opinion, and so decrees, that each should contribute to the recovery against them herein had for damages and costs an amount which would be equal in proportion to the amount of the respective debts of each upon which suits were brought, and, if complainants so desire, they may, as between themselves, have a reference to the Clerk and Master to ascertain their proportion on the above basis, and a reference was ordered accordingly, the Clerk and Master to report as soon as practicable. From this decree, the several complainants, creditors of Hirsch & Co., appealed, the order of reference being unexecuted, and they have assigned errors. These errors are, in substance:

1. That attorneys' fees are not a proper element

of damages for wrongfully suing out attachment or injunction writs and obtaining impounding orders.

2. That taxes paid by the receiver on the fund while in his hands under impounding orders, are not proper elements of damage in such cases.

3. That the item of $11.40 costs was not a proper matter of damages.

4. That the commissions of $68.70 to the receiver should not have been allowed as damages.

5. That it was error to allow damages against parties who reached nothing by their attachments on account of the fact that the entire fund was absorbed by prior attachments.

6. That it was error to give a joint judgment against all the creditors, and against each for the full amount of the entire fee allowed for all the cases.

7. That the Court erred in adjudging against appellants the costs of the reference to the Clerk and Master.

The first and most important question presented is, Are counsel fees proper elements of damage in cases where attachments and injunctions are wrongfully sued out and impounding orders wrongfully obtained? Upon this question there is an abundance of authority and an irreconcilable conflict of decisions in the Courts of the several States and the Federal Courts.

In High on Injunctions, Sec. 1685, it is held that, according to the great weight of authority, reason-

able counsel fees, incurred in procuring the dissolution of an injunction, is a proper element of damages, the amount being limited to the fees paid for procuring the dissolution, and not for the general defense of the case. This holding proceeds upon the idea that the defendant has been compelled to employ counsel to rid himself of an unjust restriction which the plaintiff has placed upon him, and hence such fees will only be allowed when motion is made to dissolve pending the litigation and before the hearing on the merits. Section 1686. Again: Fees will not be allowed to cover the entire expense of the defense, but only for such as was incurred about the injunction. Sections 1688–1690. See also Sedgwick on Damages, Vol. I., Sec. 257; Sutherland on Damages, Vol. I., Sec. 85; Vol. II., Secs. 524, 525; Beach on Injunctions, Secs. 203–210. In these text books the principal authorities pro and con are cited and collated. A well-considered case holding the majority view is *Cook* v. *Chapman*, 41 N. J. Eq., p. 152.

This rule thus stated, with minor modifications, is laid down in some twenty-six States of the Union, among them the following: Alabama, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Virginia, and West Virginia. In some of these States the matter is regulated by statute, as in Iowa, Mississippi, and Washington State. But

the rule is held otherwise in Arkansas, Maryland, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and is settted by neither statute nor decision in Connecticut, Massachusetts, North Dakota, and Rhode Island, so far as we have been able to ascertain. In the United States Supreme Court and in the Federal Courts such fees are not allowed.

The case of *Oelrichs* v. *Spain*, 15 Wall., 211, sets forth the holding of the Supreme Court of the United States in a case very similar to the one at bar. In that case injunction was granted upon a bond conditioned to prosecute the writ with effect, or pay and satisfy the damages and charges which should be occasioned by such writ. The injunction was dismissed, and suit was brought upon the bond to recover damages, including counsel fees. The Court below allowed $2,500 counsel fees, and the case was appealed. The Court referred to the case of *Arcamble* v. *Wiseman*, 3 Dall., 306; *Teese* v. *Huntington*, 23 How., 2; *Day* v. *Woodworth*, 13 How., 370, 371, and other cases, as being analogous, and continued: "The point here in question has never been decided by this Court, but it is clearly within the reasoning of the case in 13 How., and we think it substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases where there are no injunctions, only taxable costs are allowed complainants. The

same rule is applied to the defendant, however unjust the litigation of the other side may be, and however large the *expensæ litis* to which he may have been subjected. The parties, in this respect, are on a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand more than others, more counsel may be employed than are necessary; when client and counsel both know that the fees are to be paid by the other party, there is danger of abuse. A reference to a Master, or an issue to a jury, might be necessary to ascertain the proper amount, and the grafted litigation might be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the Court to scale down the charges, as might sometimes be necessary." The Court continues: "We think the principle of disallowance rests on a solid foundation, and the opposite rule is forbidden by the analogies of the law and sound public policy."

In Tennessee we have the following cases bearing more or less directly on the controversy:

In *Littleton* v. *Frank Bros.*, 2 Lea, 301, Deaderick, Ch. J., delivered the opinion of the Court: "This is an action at law by plaintiff against defendants, who were sureties on an attachment bond executed in a suit in Chancery Court. The attachment was issued wrongfully, although on probable cause. The damages sued for are counsel fees, $125, and costs, $2.50, incurred in defending said attach-

ment suit. The Circuit Judge, deciding the case without a jury, held the plaintiff not entitled to recover, and she appealed. As to the $125 counsel fees, we have held in an unreported case such fee is not recoverable in cases like this. But plaintiff, for the wrongful suing out of the injunction, is entitled to recover some damages, and the judgment of the Circuit Court will be reversed, and judgment entered here for plaintiff for $2.50 damages, with costs." *Littleton* v. *Frank Bros.*, 2 Lea, 301.

In *Williams* v. *Burg*, 9 Lea, 456, suit was brought to recover upon an alleged breach of warranty in a deed, where the title had failed. In such case, of course, the defendant must make defense, and the eviction must be by legal process in order to entitle the vendee to proceed upon the covenant of warranty. It is a matter of necessity that he shall defend, and, in such defense, the services of an attorney are necessary. In regard to the right to recover attorney's fees in making such defense, this Court used this language:

"If the employment of counsel be necessary, upon principle, it is not easy to see why the expense is not as much a legitimate part of the damage sustained as the costs of the cause. The common law doctrine that the services of counsel are honorary and gratuitous, does not prevail in this State. *Newman* v. *Washington*, M. & Y., 79. Yet, if such expense is put upon the same ground as the costs, the plaintiff would in every case recover his

necessary counsel fees in protecting a rightful claim against a defendant, precisely as he recovers his costs. There would be some justice in the claim, and, in some States, and in the Federal Courts, a tax fee is, in some instances, allowed. But such fees have never been allowed in the Courts of this State. It is within the recollection of some of the members of this Court that we have decided against the claim in a case precisely of this character. We have certainly so decided analogous cases, and the Chancellor's decree on this point will be affirmed. *Williams* v. *Burg*, 9 Lea, 456, 457.

In the case of *Davenport* v. *Harbert*, 1 Legal Reporter, 172, it was sought to recover attorney's fees as damages upon an injunction bond. This Court refused to allow such damages, and in deciding the case used this language: "To hold her responsible for fees to adversary's counsel would be to establish precedents under which all successful defendants might claim reimbursements for fees paid their attorneys." *Davenport* v. *Harbert*, 1 Leg. Rep., 173.

In *White* v. *Clack*, 2 Swan, 231, this Court declined, in an action for mesne profits, to allow counsel fees incurred in the prosecution of the action of ejectment.

It is insisted that the cases of *Davenport* v. *Harbert*, 1 Leg. Rep., 173, and *Oelrichs* v. *Spain*, 15 Wall., 211, *supra*, are not exactly similar to the case at bar, inasmuch as they do not show that

the fees claimed in those cases were properly fees incurred about the injunctions alone, and not in the general defense of the cases; and this criticism is just, so far as we can see from the meager reports of these cases; but at last the question, if not settled by these cases on analogies, is one of broad public policy, and should be settled in accordance with the general trend of our decisions in similar cases and with the wisest public policy.

It is difficult to see upon what ground counsel fees incurred by the adverse party should be charged up to the defeated party any more in attachment and injunction cases than in other litigations upon contracts or for damages for torts. The litigation may be equally unjust and oppressive in other cases as in the case of attachments and injunctions. It is true, the latter cases are, in some respects, more summary, and may entail damages arising out of the seizure of defendant's property; but all this is provided for by the terms of the bond required to cover damages sustained. But counsel fees are as necessary in the one class of cases as in the other, and are neither peculiar nor more onerous in cases of attachments and injunctions than in other cases.

It is said that additional fees are required to remove the attachment and injunction, and relieve from the impounding orders, but this is more imaginary than real, as the attention necessary to protect and guard against the injunction or attachment is in a vast majority, if not all the cases, merely incidental

to the defense upon the merits, and it is practically impossible to distinguish between services rendered about the attachment or injunction and that about the defense of the case generally. Any apportionment of the fees between these different services is more or less arbitrary and fanciful. But, if it were otherwise, it is at last but counsel fees of the opposite party which his adversary is called upon to pay.

It is said that in attachment and injunction cases a bond is required, the conditions of which are to pay all such damages as occur by the wrongful suing out of the writs, and that this creates virtually a contract on the part of the defendant to pay such damages. But we think that this is a mistaken view of the office and reason of the bond. The liability for damages for wrongfully suing would be the same so far as the principal in the bond is concerned, whether the bond were executed or not, and the office of the bond is not to create or regulate the liability of the principal, but to bring in the bondsmen, as the securities of the principal, to answer for such damages as are proper. While the liability of the sureties arises out of the execution and condition of the bond, the liability of the principal in nowise depends upon the bond or its conditions.

We think that the analogies of the law, as well as the soundest public policy, demand that counsel fees, in suits upon contracts, or for damages for torts, or upon attachments or injunctions, should not be regarded as a proper element of damages, even where

they are capable of being apportioned so as to show the amount incurred for the attachments and injunctions as separate and distinct from the other services necessary in the case. It is not sound public policy to place a penalty on the right to litigate; that the defeated party must pay the fees of counsel for his successful opponent in any case, and, especially, since it throws wide the doors of temptation for the opposing party, and his counsel, to swell the fees to undue proportions, and, in cases of attachment and injunction, to apportion them arbitrarily between the fees pertaining properly to the attachment and injunction and that relating to the merits of the case.

We think the second assignment of errors is well made. The funds in the hands of the receiver were subject to taxation. There is no evidence or intimation that they were doubly taxed. The parties entitled to the funds were residents of the State, and the funds were taxable, and would have been so, we must assume, even if the complainants had realized them, and put them into their business, or otherwise invested them. We cannot presume that they would have so disposed of the funds as to escape taxation if they had been realized and paid over to them.

We think the item of $68.70 commissions to the Clerk and Master and receiver was not a proper element of damages. This was commission upon the interest which accrued from loaning out the impounded fund. Whether this should have been al-

lowed to the receiver is a question not now before us, but it appears that this fund was loaned to the creditors who were adjudged entitled to it on final hearing, and it was never, in fact, paid into the hands of the Clerk, nor paid out by him, and was simply charged up to the attaching creditors on final settlement of their accounts. It was a mere incident to the receivership which was instituted by these creditors, and before the defendants appeared in the case. The fund could have been drawn out on refunding bond instead of being loaned.

It was error to charge each attaching party the full amount of these damages, or to give a joint judgment against them. There was no joint tort by the several attaching creditors. There was no joint liability between the principals and sureties in the several bonds executed, and no connection between them at the time the attachment and injunctions were sued out and the damage done. The fund in the case was originally impounded by the creditors Jonas, Petri, and Lowenheim. It remained tied up by them, as well as by the subsequent attachments, until the final hearing in the case. It is apparent that the liability of the first attaching creditors may be very different from that of one who subsequently attaches a fund already tied up in Court. One may cause the loss of credit and damage to business, the other may not affect either. One creditor may reach no fund, while another may realize the whole of it. Each case must stand on

its own merits and facts. If wrongfully suing, each creditor is liable for his own tort. There is no joint liability for distinct and different torts. There is no right of contribution if one should have the whole of the recovery to pay. The attempt of the Chancellor to apportion this joint judgment between the creditors in proportion to their debts, proceeds upon a theory entirely untenable. It cannot be assumed, and certainly is not shown, that the damages were caused by the several creditors in the proportion of their respective debts. On the contrary, it clearly appears that it is impossible to show how much of this damage was incurred in each particular case, and hence the necessity for apportionment, but this necessity does not make the apportionment right and proper, but shows its incorrectness in theory.

The item of $11.40 purports to be made up of certain cost items taken from the tax journal, a book kept by the Clerk and Master in his office. The items are not specified and described so that we may know what they are. It is said these are items of cost, accruing alone upon account of the injunction and attachment proceeding in the several cases while being heard together. This may be so, but the nature of the items does not sufficiently appear, and, moreover, the joint judgment for them cannot be sustained in this case, even if they were proper elements of damage. There are other reasons in these cases which make the decree of the Chan-

cellor erroneous as to the different creditors, each having some facts peculiar to his case, but we deem it proper to pass over minor irregularities and decide the matter involved on the broad grounds of the correctness or incorrectness of the items.

We are of opinion the Chancellor was in error, and we reverse his decision and discharge the reference, and dismiss the proceedings at the cost of the complainants, Jonas & Co., Lowenheim, and Petri.

The case of *Margaret G. Neal* v. *Henry E. Neal* is entirely distinct and separate from the other cases, and has no connection with them in any way whatever, but involves the question alone of whether counsel fees paid for services rendered about the injunction only are legitimate elements of damage in a suit, or upon reference against the enjoining complainants and his sureties. The question is presented in this case clearly and uncomplicated by any other question, and it is reported with the former cases to show the same holding and result.

The Chancellor in the Court below allowed the fee on reference, and we think this was error, and the decree of the Chancellor is reversed with costs against appellee.

MANIER & CO. *v.* WESTERN UNION TELEGRAPH CO.

(*Nashville.* February 23, 1895.)

1. TELEGRAPH COMPANIES. *Negligence in sending message. Example.*

A telegraph company is negligent in sending and delivering a message addressed by an attorney to his client inquiring whether the latter desired attachment of its failing debtor's property, and requesting a prompt answer, where the message was received by the company about nine A.M., and was not delivered until between six and seven P.M. of the same day, without other excuse for the delay than that the messenger boy, finding the addressee's business house temporarily closed, left the message for him with a reputable neighbor, who paid the charges and undertook to deliver it. (*Post, pp. 443–445.*)

2. SAME. *Negligence not cause of loss, when.*

The negligence of a telegraph company in forwarding a message whereby a creditor's attachment of his debtor's property is postponed to the attachments of other creditors, does not render the company liable for the debt where it appears that the property attached was of sufficient value to satisfy all the debts, and that it was sold at private sale, by agreement of parties, to which the company was not a party, for an insufficient sum and at a great sacrifice. (*Post, pp. 445, 446.*)

3. SAME. *Notice of claim for damages.*

A contract exempting a telegraph company from liability unless the claim for damages resulting from negligence in transmission of message shall be made within sixty days after the message is sent, is a reasonable and valid stipulation. (*Post, p. 446.*)

Cases cited: 60 Pa. St., 83; 34 N. Y. (Sup. Ct.), 390; 21 Wall., 264; 4 S. Rep., 468; 95 Ind., 93, 94; 17 Mo. App., 259; 39 Fed. Rep., 181; 19 S. W. Rep., 256.

4. SAME. *Same.*

It is not sufficient compliance with this contract to notify the telegraph company of delay of message, and probable loss, without presenting any distinct claim; nor to give the notice

more than sixty days after the message is sent, although the loss could not be accurately ascertained without litigation that could not be terminated within that period. (*Post*, *pp.* *448*, *449*.)

5. SAME. *Addressee bound by sender's contract.*

The addressee, for whose benefit a message is sent, is bound by the contract made between the telegraph company and the sender. (*Post*, *pp.* *447*, *448*.)

Case cited and approved: Wadsworth *v.* Telegraph Co., 86 Tenn., 712.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. ANDREW ALLISON, Ch.

J. C. MCREYNOLDS for Manier & Co.

JAS. S. PILCHER and LEMUEL R. CAMPBELL for Western Union Telegraph Co.

SNODGRASS, Ch. J. The complainant sued the defendant for failure to deliver in time a certain message sent complainant from Starkville, Miss., by its lawyer at that place, advising complainant that Hollinshed & Co., merchants at Starkville, and debtors of complainant, were having their property attached by creditors, and requesting that complainant should wire its lawyer the amount of its claim and the names of the individual members of its firm. To this message quick answer was asked, saying whether or not complainant desired to attach. This message

was delivered to defendant's agent at Starkville about nine o'clock A.M., December 25, 1891. It was addressed to complainant at its business house on the Square, in Nashville. The messenger boy took the dispatch to the place of address, and found the house closed. Mr. Carter, of Carter, Dunbar & Co., a neighboring firm of reputable merchants, told the boy to leave the dispatch with him, which he did, Mr. Carter first paying the charges. The dispatch did not reach the complainant until between six and seven P.M. of the same day. As soon as practicable, about an hour thereafter, the complainant answered. The reply message was delivered at Starkville about 9:30 A.M. of the next day. The complainant's counsel, on receipt of the message, brought suit against Hollinshed & Co., attaching its property. Before this attachment was levied, however, other attachments had been levied in favor of other creditors, and, finally, after judgment for the full amount, complainant only obtained about the sum of $385 on its debt of $1,920.

This bill was filed November 19, 1892, to recover of defendant, as damages, the difference between the amount finally realized by the attachment and the amount of the complainant's debt. The bill was answered, proof taken, and, on the hearing, the Chancellor dismissed the bill. The complainant appealed and assigned errors.

The complainant insists that the decree was erroneous, because of the fact that it had shown negli-

gence in the delivery of these messages, and loss to the amount of the claim not satisfied by the attachment, it being made to appear that Hollinshed & Co., and the members of that firm, are insolvent, and that the loss of the debt resulted from the failure to attach in time. The defendant denies all these propositions. It insists that it was not negligence that caused the delay of either message, and that the complainant's attachment was levied on property sufficient to have paid the debt; that that property was disposed of in the attachment suits by agreement of the creditors, to which defendant was not a party, and that, therefore, it is not liable for the loss. It further insists that it is not liable because the claim for damages was not presented in writing within sixty days after the sending of the message, according to the terms of the contract contained in the blank upon which the telegram sent was written by complainant's counsel, and on which or similar blank it was delivered to the complainant. It makes other questions not necessary now to be considered.

Taking these propositions in order, it appears in evidence that there was a negligent delay in delivering the first message, and not in delivering the second.

Goods to the value of nearly $10,000 were attached. They were sold by agreement of the parties. The Sheriff, who made the sale, shows in his deposition that "the total of the receipts for the goods

was $6,505.65. Of this amount, $3,655.65 were sold at retail at ten per cent. above cost, and the remainder of the stock was sold in bulk for $2,850, at a loss of sixty per cent."—that is, a loss of $4,300. In other words, goods worth $7,150 were sold by consent of the parties for $2,850, and even under such sale Manier & Co. received about the sum of $385. So it appears this firm would have been next paid off. Had the goods brought anything like their value, complainant's debt would have been paid in full. Complainant did not choose to make the goods, which it got attached, bring its debt, nor were they so sold as to effect a judicial determination that their value was what they brought. Complainant has not, therefore, proven that the failure to deliver this message in time caused the loss. But, assume that it had, it remains to inquire whether other defenses stated are effectual to prevent complainant from obtaining relief sought. The contract, as already shown, provided that the defendant telegraph company was not liable for damages in any case where the claim was not presented in writing within sixty days after the sending of the message. Such a stipulation is reasonable, and has been repeatedly upheld by the Courts. *Wolf* v. *Telegraph Co.*, 62 Pa., 83; *Young* v. *Telegraph Co.*, 34 N. Y. (Sup. Ct.), 390; *Express Co.* v. *Caldwell*, 21 Wall., 264; Am. & Eng. Ency. of Law, Vol. XXV., p. 798, and notes. And see 4 S. Rep., 844; 15 S. Rep., 468; 95 Ind., 93, 94; 17

Mo. App., 259; 39 Fed. Rep., 181; 19 S. W. Rep., 256.

The complainant insists that it is not bound by such stipulation, for several reasons: First, it did not make the contract, and, as the addressee of the message, is not bound by its terms. There are cases so holding, with many to the contrary. It is not necessary to determine in this case where the weight of authority lies. It is held in numerous cases that the addressee is bound by the reception of a dispatch upon similar blank containing like provisions with one used by the sender. It has also been held that the addressee may be presumed to have been aware of the terms of such contract when he appears to have been a patron of the telegraph company under circumstances sufficient to charge him with knowledge of such forms. Mr. Manier shows complainant had been a patron of defendant for several years, sending and receiving messages.

The cases presenting and discussing these propositions will be found among the citations hereinbefore and hereinafter made in other connections, as well as in 114 Ind., 511; 31 Fed. Rep., 362; 21 Pac. Rep., 339; Am. & Eng. Ency. of Law, Vol. XXV., p. 807 and notes; 64 Fed. Rep., 459; 14 S. E. Rep., 94; 15 S. W. Rep., 468; Thompson on Negligence, pp. 846, 847, and cases cited. The three classes of cases, those in negative of first proposition and affirmative of the last two, make

an overwhelming preponderance in favor of binding the addressee in the relation of complainant, which was not only of addressee but of addressee beneficially interested, and as one receiving message on similar blank to that used by the sender, and as a patron of the company, upon whom knowledge of the forms of contracts embodied in these blanks might be charged. We think the sound rule is, that the contract made between the sender and the telegraph company, which is for the benefit of the addressee, confers upon him the benefits, and charges him with the conditions, of the contract. In England, the addressee has no right of action as such under the contract of the sender. But this doctrine is generally rejected, and a distinctively "American rule" to the contrary is adopted in all, or nearly all, the States, including Tennessee. Am. & Eng. Ency. of Law, Vol. XXV., p. 825, note 4; *Wadsworth* v. *Telegraph Co.*, 2 Pickle, 712, and cases cited.

It follows logically that, accorded the benefits of the contract, and given the right to sue upon it, the addressee should be bound by it to the same extent as the sender, and we so hold. But the complainant insists that it was not required to bring this action within sixty days of its discovery of delay and probable loss, but only within sixty days of realization of the loss and damage which it had sustained by negligent delivery. In addition to this, complainant says that it did give the defendant no-

tice of this negligent delay of the message within sixty days, and, by so doing, imparted knowledge of probable loss, and thus presented its claim. These positions are in apparent antagonism. One assumes that the defendant did not know of its loss, and could not present its claim within sixty days, and the other that it did so. As a matter of fact, it notified the defendant of the delay of the message and probable loss, but it presented no claim therefor within sixty days. The complainant is also in error in the assertion that it could not have done so. It need not have delayed, and, under this contract, could not have delayed until the termination of that suit, to present its claim for damages. It might have done so at once. It could have notified the defendant of the delay, and that it claimed all resultant damages as its loss. The loss could have been stated to be whatever portion of the complainant's debt was not realized under the attachment. It need not have stated a specific amount, but could have done so by claiming damages to the amount of the entire debt, less whatever could be realized in the suit, and thus presented it as a claim against the company.

The decree of the Chancellor is correct, and is affirmed, with cost.

RAILROAD *v.* HUGHES.

(*Nashville.* February 23, 1895.)

1. RAILROADS. *Fencing track.*

A statute making railroad companies that fail to fence their track liable for live stock killed by their trains does not operate to require the fencing of their depots and stations, or the grounds immediately surrounding same, or the crossings of public highways, or portions of their tracks that traverse towns or cities and are intersected by public streets. (*Post, pp. 451–454.*)

Cases cited: Railroad *v.* Lull, 28 Mich., 510; Soward *v.* Railroad, 30 Iowa, 551.

2. SAME. *Liability for failure to fence track.*

The statutory liability of railroads for failure to fence track does not, in the absence of other negligence, attach when live stock enter upon the track where it is not required to be fenced and pursues it until struck by a train, although the track may not have been inclosed at the place of the accident. (*Post, pp. 451–453.*)

3. SAME. *Same.*

But the liability does attach in such case, if it appears that, in violation of the statute, the railroad company failed to provide suitable stock guards, which would have prevented stock from pursuing the track and colliding with train. (*Post, pp. 453. 454.*)

4. SAME. *Same.*

The mere fact that the track of a railroad is situated within the limits of an incorporated town does not, without more, excuse the company from the statutory duty to fence its track. (*Post, pp. 454–458.*)

FROM WARREN.

Appeal in error from Circuit Court of Warren County. M. D. SMALLMAN, J.

Railroad *v.* Hughes.

F. M. SMITH and W. T. MURRAY for Hughes.

T. C. LIND, EAST & FOGG, J. D. B. DEBOW for Railroad.

MCALISTER, J. This is an action on the case commenced in the Circuit Court of Warren County by J. N. Hughes against the railroad company, to recover damages for the killing of plaintiff's mare. There was a verdict and judgment in favor of the plaintiff for one hundred and fifty dollars. The company appealed and has assigned errors.

The third assignment of error is that the Circuit Judge charged the jury, *inter alia*, that "it is incumbent upon the defendant to show that its road is fenced with a good and lawful fence and sufficient cattle guards." It is insisted on behalf of plaintiff in error, that the Act of 1891, Ch. 101, fixing liability of railroads for stock killed on unfenced tracks, has no application to the facts of this case, and that the charge was therefore erroneous. It appears from the record that on January 5, 1893, the plaintiff, on reaching Tullahoma, about four or five o'clock in the evening, unhitched his two horses, and tied them by the bridle to his wagon, where he left them standing. After remaining there for some time, the horses became frightened and ran away, running side by side, and going towards the railroad depot, within the corporate limits. On reaching the depot, they turned down the railroad track, and ran south between the rails for a distance of

one half or three quarters of a mile, when, it is claimed, the mare was struck by a freight train moving north, and sustained injuries which caused her death. The railroad track was not fenced either at the depot crossing, where the mare first went upon the track, or at the point where it is claimed she was struck by the train. The witness, J. M. Muse, introduced by plaintiff, testified that he "tracked two horses from the railroad depot in Tullahoma, going south, for about one half mile, and the two tracks were between the rails nearly all the way; sometimes one track was on the outside of the rail." The insistence of defendant's counsel upon this state of facts is that if an animal gets upon the track at a highway crossing, in the depot grounds, or other place where the track is not required to be fenced, the mere fact that the fence at the place of injury was defective or torn down, or was never erected, would not render the railroad liable.

It is true, as assumed by counsel, that statutes creating a liability against a railroad company for a failure to fence its track do not apply to highway crossings nor to depot and station grounds. *Flint, etc., Railroad Co.* v. *Lull*, 28 Mich., 510; *Soward* v. *Chicago & N. W. Railroad Co.*, 30 Iowa, 551. Says Mr. Thornton in his work on Railroad Fences, Sec. 91, viz.: "It has always been regarded that the fencing of a station or depot, and the grounds immediately around it, would not only be such a

great inconvenience to the company as to excuse it from fencing, but would so greatly inconvenience the public in passing to and from the station or depot, as to furnish an additional and sufficient pretext for not fencing. The rule is therefore firmly established, even though the statute makes no exception as to it, that a company is not required to fence its station nor its depot, or ground immediately surrounding either, which are necessary for the public to use in dealing with the company. Nor is it bound to fence the approaches to its station grounds," citing numerous authorities.

Wood on Railroads, Vol. III., Sec. 419, says: "Depot grounds, as a rule, cannot be fenced, at least without great inconvenience to the company as well as to the public, and, generally, are not required to be, and, where cattle, straying upon the highway, escape upon the track over such grounds, or at any point where the company is not required to erect a fence, the company is not responsible."

It is the condition of the road at the place where the animal entered upon the track, and not its condition at the *locus in quo* of the accident, that is material in determining whether the railroad has complied with its statutory duty to fence its track. 109 Ind., 295; *Id.*, 235; 38 Ill., 280; Shearman & Redfield on Negligence, Sec. 436.

So, then, in this case, if nothing else appeared, the company would not be liable for the omission to fence at the place where the accident occurred,

since the mare entered upon the track at a point where the company was not bound to fence. But it will be observed the statute not only imposes upon the company the duty to fence, but likewise the duty to construct sufficient cattle guards; and, while the company is not liable for having failed to fence its depot grounds where the mare entered upon the track, yet it is obvious that, if sufficient cattle guards had been provided, as required by the statute, the animal could not have passed up this track for a distance of three quarters of a mile. So that this contention must fail.

It is insisted, however, that this accident is shown to have occurred within the limits of an incorporated town, and that the statute, therefore, has no application. This question arose in the case of *Ells* v. *Pacific Railroad*, 48 Mo., 232. The Court said: "In regard to the first defense, it appeared that the portion of the town where the accident happened had not been laid out into lots, streets, and alleys, and that no road or street had been established to cross the railroad near that point. This action is prosecuted under the fifth section of the Act concerning damages, etc. (Wagn. Stat., 520), and the question is raised for the first time in this Court whether a railroad company is excused from fencing the track of its road when it runs through a town or city, merely from that fact, and without reference to whether it thereby crosses the public highways of such city or town. The statute makes

no exception in regard to towns, but only an implied one in the crossing of a public highway. Nor do the cases referred to enlarge the exception. Ordinarily, a railroad track cannot run any considerable distance within a town without being crossed by some street, either actually opened or merely established. In that case, the fencing cannot be required, for it would shut up a street actually in use, or one that has been laid out and dedicated, and may soon be opened. But where the corporation lines embrace portions of the adjacent country not actually laid out as a town, or so laid out that no streets cross the railroad, the reason for the exception does not apply, and the obligation to fence is as imperative as outside the corporation limits."

Mr. Thornton, in his recent work on Railroad Fences and Private Crossings, after a thorough review of all the authorities, reaches substantially the same conclusion as that announced in the case just cited. The author quotes an Indiana case, in which the Court said, viz.: "The statute makes no provisions as to the places which may be left unfenced; but the Courts, recognizing the necessity of excepting streets of towns and cities and places where the business of the railroad companies demand that no fences be made, have engrafted exceptions upon the statute. These exceptions have been made, not to advance the private interests of railroad corporations, but to promote the public good by enabling

the corporations to discharge their duty to the public. These exceptions exist only where a necessity is shown."

Again, it was said in another case: "But whenever a railroad company can build and maintain such a fence without interfering with the rights of the public, or with the free use of private property, then it is bound to maintain the fence, whether it be in a city, village, or in the country." Thornton on Railroad Fences, etc., Sec. 86.

In another case it was said that there are places within an incorporated town where the railroad may fence, as where there are no streets or alleys, and the public travel would not be interrupted by such fence. *Young* v. *Hannibal Railroad*, 79 Mo., 336. Such is particularly the case if the adjacent lands are used for farming purposes (66 Mo., 683), or where a block of land is not intended for streets and alleys (38 Ind., 447); but whenever the land is regularly laid out in lots, blocks, or streets, the streets crossing the railroad, which streets have been dedicated to public use as public highways, it would be unlawful for the railroad to fence up the streets in such towns, and it would make no difference in such case whether the town so laid out into streets, etc., was incorporated or not. *Gerren* v. *Hannibal Railroad Co.*, 60 Mo., 405, cited in Thornton on Railroad Fences, Sec. 88.

Again, in the case of *Lathrop* v. *Central Iowa Railway Co.*, 69 Iowa, 105, the Court said: "The acknowl-

edgment and recording of the plat operated to vest in the public the right to occupy and use the ground designated as streets and alleys for highway purposes. This right accrues to the public at once upon the acknowledgment and recording of the plat, and continues until it is divested by some act of the public authorities, or lost by adverse possession. * * * The fencing of the track at the place of crossing against live stock running at large, would have the effect to exclude the public, in many cases, from using the highway at that place, and it follows necessarily that the right to do this does not exist." We think these authorities lay down the correct rule, and whenever it appears that a railroad track is intersected by streets and alleys, whether actually opened or merely dedicated to the public use upon a plat, and whether the city, town, or village is incorporated or not, the statutory duty to fence does not apply. "But where the corporation lines embrace portions of the adjacent country not actually laid out as a town, or so laid out that no streets cross the railroad, the obligation to fence is as imperative as outside the corporation limits."

When we come to apply these principles to the facts of this particular case, we find nothing in the record to indicate that, from the point where the animal entered upon the track to the point where the accident happened, the railroad track was intersected by any street or crossing, either actually opened or dedicated to the public use. All that the record dis-

closes is, that the point where the mare went upon the track, and the entire distance she ran, as well as the place of the accident, were all within the corporate limits of Tullahoma. It must always appear from the evidence that there was a sufficient reason for not obeying the statute. Thornton on Railroad Fences, Sec. 86. The exceptions to the statute exist only in cases where necessity is shown. The only reason assigned in this case is, that the railroad track was within the limits of an incorporated town, and this, without more, we hold to be insufficient. It results that the company, having failed to fence its track as required by the statute, is liable for the killing of the mare, independent of the question of negligence. *Railroad* v. *Russell*, 92 Tenn., 108.

Affirmed.

GARRETT *v.* BELMONT LAND CO.

(*Nashville.* February 26, 1895.)

1. ADVERSE POSSESSION. *Of town lots.*

There must be actual inclosure, whenever the property is susceptible of such inclosure, in order to make out adverse possession of unoccupied town lots. Mere payment of taxes thereon will not suffice. (*Post, pp. 464–468.*)

Cases cited: Pullen *v.* Hopkins, 1 Lea, 741; Hicks *v.* Trederick, 9 Lea, 492; West *v.* Lanier, 9 Hum., 762; Creech *v.* Jones, 5 Sneed, 631; Copeland *v.* Murphy, 2 Cold., 64; 4 Ired., 310; 74 Iowa, 294; 39 Ill., 546; 1 Wharton, 303; 12 Fed. Rep., 820; 44 Minn., 135.

2. CORPORATIONS. *Deeds of.*

The deed of a private corporation is ineffectual at common law to pass the legal title to real estate which recites no authority for its execution, and is signed by an individual describing himself as president of the corporation, without affixing the corporate seal, and which purports to have been acknowledged by him personally, and not by the corporation through him. (*Post, pp. 466–479.*)

Cases cited and approved: Binkley *v.* Bethel, 9 Heis., 786; 33 Am. Dec., 193; 19 Am. St. R., 761; 45 Fed. Rep., 148; 32 Cal., 639; 2 Col., 150; 2 Cush., 337; 8 Conn., 191; 7 Mass., 19; 16 Mass., 42; 136 Ill., 289; 40 Mo. App. R., 360; 131 Pa. St., 393; 43 N. H., 343; 97 N. C., 300; 88 Ky., 272; 21 Am. St. R., 339; 23 Am. Dec., 746, note.

3. SAME. *Same.*

And such deed is not effectual under § 2819 (M. & V.) Code, providing that conveyances of real estate executed by an agent or attorney may be signed "by such agent or attorney for his principal. * * * if the instrument, on its face, shows the character in which it is intended to be executed." (*Post, pp. 472, 473.*)

Code construed: § 2819 (M. & V.); § 2012 (T. & S.).

Cases cited: Cocke *v.* Dickens, 4 Yer., 34; Fitzpatrick *v.* Fain, 3 Cold., 17.

4. SAME. *Same. Abolition of private seals.*

Our statute declaring that "the use of private seals in written contracts, except the seals of corporations, is abolished," did not operate to dispense with the common law rule requiring the deeds of corporations to be executed under seal. (*Post, pp. 475–479.*)

Code construed: § 2478 (M. & V.; § 1804 (T. & S.)

Cases cited: Roper *v.* Stone. Cooke. 499; Shelton *v.* Bruce, 9 Yer., 26; Read *v.* Wheeler, 2 Yer., 55; Brown *v.* Parks, 8 Hum., 297; Nivens *v.* Merrick, 1 Tenn., 314; Coleman *v.* Sanderlin, 5 Hum., 563: Anderson *v.* Settle, 5 Sneed, 203; Thompson *v.* Thompson, 2 Head, 407; Evans *v.* Pigg, 3 Cold.. 397; Simpson *v.* Moore, 6 Bax., 373; Nunnelly *v.* Dougherty, 1 Yer., 27; Turbeville *v.* Ryan, 1 Hum., 113.

Question reserved: Whether corporations organized under the general incorporation Act of 1875 may convey their real estate without affixing corporate seal to deed.

5. EJECTMENT. *Plaintiff must show legal title.*

Under an ejectment bill averring a legal title. the complainant cannot recover upon proof of an equitable title. (*Post, p. 479.*)

Cases cited and approved: Langford *v.* Love, 3 Sneed, 308; Rogers *v.* Cawood, 1 Swan. 146; Campbell *v.* Campbell, 3 Head, 325; Walker *v.* Fox, 85 Tenn.. 160; Evans *v.* Belmont Land Co., 92 Tenn., 348.

6. EVIDENCE. *Contemporaneous transaction.*

The recitals of a record constituting a contemporaneous transaction. explanatory of the matter in litigation. may be admitted as evidence against litigants who were not parties to the suit in which the recitals were made. (*Post, pp. 480, 481.*)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. ANDREW ALLISON, Ch.

A. E. GARRETT, E. H. EAST, VERTREES & VERTREES for Complainants.

J. C. BRADFORD, BAXTER & HUTCHESON, J. H. ACKLEN for Defendants.

WILKES, J. This is an ejectment suit, brought by A. E. Garrett and J. A. Hayes, Jr., to recover lots Nos. 23 and 41 in what is styled the O. B. Hayes plan, a suburb of Nashville.

The Belmont Land Company claims, and is in possession of, lot No. 41, and defendant, Valentino, claims, and is in possession of, No. 23. Upon the hearing, the Chancellor gave judgment for the complainants for the lots, and defendants have appealed and assigned errors.

Both parties trace their titles to a common source, Joel A. Hayes, Sr., who was the father of complainant, J. A. Hayes, Jr., the father-in-law of complainant, Garrett, and the brother of Mrs. Adelicia Cheatham, under whom the defendants derived their title.

Complainants' title is as follows: On December 5, 1873, the Second National Bank of Nashville recovered a judgment before Justice of the Peace James Everett, against one Henry M. Hayes, for $370 and costs. Joel A. Hayes, Sr., the brother of H. M. Hayes, became stayor on the judgment. After the stay expired, and on August 6, 1874, the Justice issued an execution on said judgment, which came to the hands of Constable W. C. Shaw, and was levied by him on lots Nos. 11, 20, 23, and 41,

in O. B. Hayes' plan, as the property of J. A. Hayes, the stayor. After the levy of the *fi. fa.*, the papers were returned to the Law Court of Davidson County for the condemnation of the land. The order of condemnation was entered by that Court January 29, 1875. *Venditioni exponas* issued on March 2, 1875, and the lots were sold by the Sheriff on May 1, 1875, the Second National Bank becoming the purchaser, at the price of $107.42 for each lot. Afterwards, on July 7, 1877, the Sheriff executed to the Second National Bank a deed to said four lots.

On October 13, 1877, James McLaughlin, president of the Second National Bank, executed and delivered to A. E. Garrett and J. A. Hayes, Jr., a deed to said lots. It is insisted this deed is invalid, because, as signed, it was not the deed of the bank, but simply that of James McLaughlin, and because it was not executed under the seal of the bank. But it is insisted, if the deed shall be held valid, that Garrett and Hayes, Jr., held title to the lots not for themselves, but for the use and benefit of Joel A. Hayes, Sr., having in fact redeemed or repurchased them for him, and having afterwards been repaid the amounts advanced by them to regain the lots.

It is assigned as error that the Chancellor should have held:

1. That defendants, and those under whom they claimed, had been in adverse possession of said lots,

under color of title, for more than seven years next preceding the filing of the original bill.

2. That the deed of James McLaughlin, president of the Second National Bank, under which complainants claim, was void, and conveyed to them no title in said property, or, at most, vested in them only an equity which was insufficient to entitle them to recover.

3. That the alleged purchase of the lots by complainants from the Second National Bank was, in law and in fact, a redemption for J. A. Hayes, Sr.

Appellants' chain of title is as follows: On July 12, 1875, Mrs. Adelicia Cheatham, a sister of Joel A. Hayes, Sr., recovered a judgment in the Circuit Court of Davidson County against Joel A. Hayes, Sr., upon which execution issued, and was levied September 4, 1875, on these two lots, 23 and 41, as well as lot No. 11, and other real estate not now in controversy, and on November 26, 1875, the lots were sold by the Sheriff, and lots Nos. 23 and 41 were bought by Mrs. Cheatham, and the Sheriff made a deed to her February 15, 1881. She conveyed the lots January 11, 1887, with other lots, to Lewis T. Baxter, for $49,000; and on October 17, 1889, Baxter and wife conveyed lot No. 23 to E. C. McDowell, who afterwards sold the same to defendant, J. L. Valentino. March 17, 1890, Baxter conveyed lot No. 41 to the Belmont Land Company. It is claimed that Mrs. Cheatham paid taxes on the lots from the time she bought them, in 1875, and claimed

them as her own, until she sold them, January 11, 1887. They were not inclosed, but lay in an open common, which had been subdivided into a large number of lots, known as the "O. B. Hayes' Plan." These lots were owned by different parties, and were mostly vacant and unimproved. No roads or highways were built through them until, in 1888, the defendant company opened what is called Belmont Avenue. Until this was done, the lots were inaccessible, and their value was speculative and dependent on the growth of the city. On April 23, 1883, Mrs. Cheatham, by deed duly registered, dedicated to the public, for use as a highway, ten feet off of each of these lots fronting on Belmont Avenue, but the lots are not mentioned specifically by numbers, and the deed was not registered until after the bill in this case was filed; and in 1889 the Belmont Land Company graded and put a drain pipe through No. 41. In the meantime, complainants paid no taxes upon the lots, nor exercised any public acts of ownership over them, until about October 23, 1890, when this bill was filed. This is virtually all the evidence in regard to possession.

Defendants plead and rely on the statute of limitations, coupled with this adverse possession, which, they insist, was all that the lots were capable of, and they cite and rely upon the following cases: *West* v. *Lanier*, 9 Hum., 762; *Creech* v. *Jones*, 5 Sneed, 631; *Copeland* v. *Murphy*, 2 Cold., 64; *Pullen* v. *Hopkins*, 1 Lea, 744; *Bynum* v. *Carter*,

4 Iredell, 310; *Green* v. *Haman*, 4 Dev. Law, 158, 161; *Brick* v. *Holt*, 74 Iowa, 294; *Hatch* v. *Bigelow*, 39 Ills., 546; *Krider* v. *Lafferty*, 1 Wharton, 303; *Bamen* v. *Ward*, 12 Fed. Rep., 820; *Costello* v. *Edson*, 44 Minn., 135.

In these several cases it was held that digging sand, digging ore, the annual making of turpentine, running a plowed furrow around a tract of prairie land, laying down sidewalks, and placing agent's sign board on a town lot, growing and cutting willows for basket making, cutting underbrush, grubbing, and paying taxes on village lots, under the facts of the respective cases, constituted adverse possession, without actual inclosure or residence upon the premises.

In the answer filed by the defendants, they state that "said blocks or lots of land are what is known as fine blue grass lands, and are suitable for cultivation. They are located in the suburbs of the city of Nashville, and are entirely too small for agricultural purposes. It is true no person has attempted to build a house on either of them, or to inclose any part of either of them, until recently, when each lot was inclosed. Said blocks or lots are like a great many other lots in the suburbs of Nashville; they have been left uninclosed and unimproved until recently, awaiting a purchaser who desired to build. The only acts of ownership of which they were susceptible in their uninclosed condition was the payment of taxes upon them, which

have all been paid by Mrs. Cheatham or those claiming under her since her purchase."

It is proper to remark in this connection that taxes were not paid upon the lots by either party by specific description, and none have at any time been paid or claimed to have been paid by complainants, but defendants claim that Mrs. Cheatham paid taxes upon these lots along with other property and lots owned by her in the same locality after her purchase until the sale.

We are of opinion that neither party has had such actual adverse possession of the lots as would ripen their claims into perfect titles by virtue of such possession, and that the property has not had such inclosures as it was susceptible of. They have recently been inclosed, and the proof shows that, before the war, they were inclosed by fences, and the cases cited do not apply, even if it were conceded that they are good law in Tennessee, which it is not necessary now to determine. There must be actual inclosure, whenever the property is susceptible of such inclosure, in order to make out a case of adverse possession of town lots. *Pullen* v. *Hopkins*, 1 Lea, 741; *Hicks* v. *Trederick*, 9 Lea, 492; Newell on Ejectment, p. 728, Sec. 41.

It is insisted that the deed executed to Garrett and Hayes was invalid to convey to them a legal title to said lot, and, at most, could only vest them with an equity. The objection to the deed is as to the mode in which it was signed and acknowl-

edged, and the fact that the seal of the bank was not attached or affixed to the instrument. The deed recites on its face that "the consideration ($700) was paid by the grantors to the Second National Bank," and that "the bank conveys, remises and releases," etc., and that "said Second National Bank covenants," etc., and "said bank will warrant and defend against all persons claiming under it." It concludes: "In testimony whereof, the Second National Bank of Nashville hath hereunto set its hand, by its president, James McLaughlin, this thirteenth November, 1877, at Nashville, Tenn.

"(Signed) JAMES MCLAUGHLIN,
"President Second National Bank."

The acknowledgment was taken before the Clerk of the County Court, and recites that the within named James McLaughlin, president of the Second National Bank, appeared, etc., and acknowledged that he executed the annexed instrument for the purposes therein contained. The seal of the bank was not impressed upon or affixed to the instrument. It appears in proof that the bank had a seal; that it was not its custom to affix it to deeds or other instruments, except its stock certificates. It is insisted that a deed thus executed is not the deed of the Second National Bank as a corporation, because not properly signed and not sealed, and the following authorities are cited and relied on:

In *Love* v. *S. N. L. W. & M. Co.*, 32 Cal., 639, the parties in the mortgage were described as "The

Sierra Nevada Lake Water & Mining Company, a corporation, by their trustees, Josiah Bates and Samuel Atchison, of the first part, and Jos. Love, John Ridgway, etc., of the second part." The mortgage was signed by the said Josiah Bates and Samuel Atchison, and sealed with their seals. The acknowledgment of the mortgage was to the effect that Bates and Atchison were personally known to the Notary as trustees of said corporation, and that they personally appeared and acknowledged, each for himself, that he executed the instrument for the uses and purposes therein mentioned, "as the free act and deed of said Sierra Nevada Lake Water & Mining Company." Bates was president of the company, and Bates and Atchison were a majority of the trustees. The mortgage was held to be void on two grounds: (1) It was not executed in the name of the corporation, and (2) the corporate seal was not affixed.

In *Richardson* v. *Scott River W. & Mining Co.*, 2 Cal., 150, a mortgage was made in connection with a bond to secure a debt of a corporation styled the "Scott River Water & Mining Company," and named as parties of the first part (grantors), W. P. Pool, C. W. Tezer, G. T. Terry, and J. Reid, "president, directors, and members of the Scott River Water & Mining Company," and concludes as follows: "In witness whereof, the said parties of the first part hereunto set their hands and affix their seals," followed by the signatures of the four

persons above named, with a seal or scrawl affixed to each. It was held that this conveyance was not sealed with the corporate seal, and was, therefore, inoperative as the foundation of any right or claim to the corporate property which it purported to convey.

In *Brinley* v. *Mann*, 2 Cush., 337, a deed from the New England Silk Company, a corporation, was set up as a muniment of title. The formal parts of one of the deeds was as follows: "Know all men by these presents, that the New England Silk Company, a corporation legally established by Christopher Colt, Jr., in behalf of said corporation, and as their treasurer, of Dedham, etc., in consideration, etc., do hereby give, grant, sell, and convey, etc. In witness whereof, I, the said Christopher Colt, Jr., in behalf of said corporation, and as their treasurer, have hereunto set my hand and seal, this," etc. Signed and sealed: "Christopher Colt, Jr., treasurer of New England Silk Company." The certificate of acknowledgment stated, that "Christopher Colt, Jr., treasurer, etc., acknowledged the above instrument to be his act and deed."

In the other deed, Christopher Colt, Jr., described himself, in the concluding recital, as "treasurer of the New England Silk Company, and duly authorized for that purpose," and in the certificate of acknowledgment it is stated that, "in his said capacity," he acknowledged the instrument to be his act and deed. The case was an action to try title. The defendant

claimed by intermediate conveyances under the deed of the New England Silk Company. The plaintiff's title was based on a judgment, and the levy of an execution on the land as the property of the New England Silk Company. The levy was made after the execution of the deeds.

The Court said: "On examining the deeds to Colt, we are of opinion they conveyed him no title. * * * Both of these deeds were executed by C. Colt, Jr., in his own name, were sealed with his seal, and were acknowledged by him as his acts and deeds. In one of them, it is true, he declared that he acted in behalf of the company, and as their treasurer, and in the other he declared himself to be their treasurer, and to be duly authorized for the purpose of executing it. But this was not enough. He should have executed the deeds in the name of the company. He should, also, have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company." Citing 1 Crabb on Real Property, Sec. 703, 705; 4 Kent's Com. (3d Ed.), 451; *Stinchfield* v. *Sittle*, 1 Greenl., 1231; *Savings Bank* v. *Davis*, 8 Conn., 191.

In *Flower* v. *Shearer*, 7 Mass., 19, Parsons, Ch. J., says: "It is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal."

In *Elwell* v. *Shaw*, 16 Mass., 42, the deed was

executed by an attorney in fact, in his own name, and not in the name of his principal, reciting his power and authority. The Court held the deed to be insufficient. It was said that "it was important that the forms respecting the transfer of real estate should be strictly observed. * * * A seal, although it may seem an unmeaning ceremony, and not at all necessary to explain the intention of the contracting parties, is, nevertheless, an essential part of the deed."

It was further said that the authority of Coombes' case is not at all shaken by modern decisions. In Coombes' case, 19 Co., the rule is very explicitly stated: "When anyone has authority as attorney to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and, therefore, the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives the authority."

In *Danville Seminary* v. *Mott*, 136 Ill., 289, 394, real estate, the property of the Danville Seminary, was conveyed by the "Board of Trustees of the Danville Seminary," and the seal of the latter corporation was not affixed to the deed. The Court says: "A deed of conveyance by a corporation must be executed in the corporate name and under the corporate seal. A corporation, like an individual, may adopt any seal which is convenient to the occasion; it must, however, be shown to have been

so adopted, and it must be affixed as the seal of the corporation, and by an officer or agent duly authorized." See also *So. Mo. Land Co.* v. *Jeffries*, 40 Mo. App. R., 360; *McElroy* v. *Nucleux Asso.*, 131 Pa. St., 393; *Tenney* v. *East Warren Lumber Co.*, 43 N. H., 343.

A deed purporting to be executed by a corporation to a trustee, which bears the signature and seal of the president, with the suffix "President of D. R. Co.," is not the deed of the corporation, but the personal act of the president. *Clayton* v. *Cagle*, 97 N. C., 300. See, also, *McKensey* v. *Edwards*, 88 Ky., 272; 21 Am. State Rep., 339, note. "When the conveyance describes the grantors as a corporation, but is executed by the president, under his own name and seal, it is not the deed of the corporation." *Leggett* v. *N. J. M. & B. Co.*, 23 Am. Dec., 746, note. See, also, 4 Am. & Eng. Ency. of Law, 240; 3 Wash. Real Property, 294, Secs. 573, 574; 1 Am. Leading Cases, 577, and cases cited.

It will be noticed in this case that the deed does not purport to have been authorized by any order of the board of directors, and the authority of the president to execute the deed does not appear, unless it be assumed that, as a matter of law, he had such authority. If the seal had been affixed, such recital would have been unnecessary, and the authority would have been present.

The Code (M. & V.), § 2819, provides that

instruments relating to real or personal property executed by an agent or attorney may be signed by such agent or attorney for his principal, or by writing the name of the principal by him as agent or attorney, or by simply writing the principal's name, if the instrument, on its face, shows the character in which it is intended to be executed.

It is insisted that the words, "President Second National Bank," are only descriptive of the person (*Cocke* v. *Dickens*, 4 Yer., 34; *Fitzpatrick* v. *Fain*, 3 Cold., 17), and, therefore, the signature is no more than the individual signature of James McLaughlin; and, not purporting on its face to be done by order of the bank directors, and not being under seal of the bank, it was only the act of James McLaughlin as an individual. It is insisted the signature should have been: "James McLaughlin, President, for the Second National Bank;" or "The Second National Bank, by James McLaughlin, President;" or, "The Second National Bank." See M. & V. Code, § 2819.

This will be further considered and disposed of in connection with the question of the necessity for a seal to a conveyance executed by a corporation at common law and in Tennessee. Prior to the adoption of the Code of 1858, the seal of the grantor was necessary to the validity of any deed made by an individual or a corporation. The use of seals by individuals arose out of necessity, as, in former days, many persons of extensive estates were too

illiterate to make their manual signatures. Its adoption and use by corporations, however, arose out of their nature and constitution, being invisible, intangible bodies, composed of an aggregation of individuals, who must speak, at least in weighty matters, through a common seal. It was accordingly held that the affixing of the seal, and that alone, united the several assents of the individuals who composed the corporation, and gave expression to the act as the assent of the whole, and that a corporation could enter into no contract of importance except under seal. The tendency of modern legislation and the trend of more recent decisions is toward the abolition of the strict rules formerly prevailing as to sealed instruments, and in many States statutes have been passed doing away, in whole or in part, with the distinction between sealed and unsealed instruments, and in most of the States the use of the seal is now regulated by statute. There is a difference kept up, however, in many of the States between the use of seals by corporations and by individuals. While it is laid down broadly that corporations may enter into contracts to the same extent as individuals without using a seal, this clearly has reference to other contracts than the conveyance of lands, and none of the cases to which we have been cited hold that the use of a seal is not required in conveyances of land. See Taylor on Corporations, Sec. 248; Morawetz on Corporations (2d Ed.), Sec. 338; Waterman on Corporations, Secs

89, 90; *Mus. W. Co.* v. *Mus. L. Co.*, 37 Am. & Eng. Corp. Cases, 119; *Gottfield* v. *Miller*, 104 U. S., 527; *Merrick* v. *Burlington Plank Road Co.*, 11 Iowa, 74–76; *Cary Holliday Lumber Co.* v. *Cain et al.*, 13 Sou. Rep., 239.

These conveyances did not involve conveyances of real estate, and none of the citations are authority for the proposition that a corporation can execute a deed without using a seal. But we think the contrary is held, more or less directly, in the following, as well as other authorities: Spelling on Private Corporations, Sec. 195; Beach on Private Corporations, 376, and Sec. 742 as to mortgages; Jones on Mortgages, Sec. 128; 1 Waterman on Corporations, Sec. 95, p. 303; Boone on Corporations, Sec. 54; 3 Washburn on Real Estate, p. 288, Sec. 7; *Leggett* v. *N. J. M. & B. Co.*, 23 Am. Dec., 746, note; 4 Am. & Eng. Ency. of Law, p. 240; 2 Am. & Eng. Ency. of Law, p. 910; *Osborne* v. *Temis*, 23 N. J. L., 633, 658; *Duke* v. *Markam*, 18 Am. St. Rep., 889, note; *Miller Ditch Co.* v. *Zellenbach*, 37 Cal., 543; *Hutchins* v. *Byrnes*, 9 Gray, 367; *Flint* v. *Clinton Co.*, 12 N. H., 430; *Tenney* v. *East Warren Lumber Co.*, 43 N. H., 343; *Hatch* v. *Barr*, 1 Ohio, 390; *Savings Bank* v. *Davis*, 8 Conn., 191; *Isham* v. *Bennington Iron Co.*, 19 Vt., 230; *Zoller* v. *Ide*, 1 Neb., 439; *Brierly* v. *Mann*, 2 Cush., 337; *Kochler* v. *Iron Co.*, 2 Black, 715, 721.

By the Code of Tennessee of 1858, it is provided (M. & V., § 2478) that "the use of private seals in

written contracts, except the seals of corporations, is abolished, and the addition of a private seal to an instrument of writing hereafter made shall not affect its character in any respect whatever."

Did the Act change the rule as to conveyances by corporations in Tennessee so as to dispense with the necessity of a seal? There is certainly nothing in the Act to so indicate, but the fact that seals of corporations are excepted by its provisions is an indication that the seal was to be used by corporations after the Act was passed, as had been done before its passage, at least in some cases. Statutes similar to this have been passed in Alabama, Arkansas, Delaware, Florida, Kentucky, Iowa, Kansas, Maryland, Minnesota, Mississippi, Nebraska, North Carolina, Ohio, Indiana, Texas, Pennsylvania, West Virginia. Nevertheless, in most of these States corporations are still required to use their seals in making conveyances, as in Ohio, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Pennsylvania, Nebraska, Kansas, and Texas. See 3 Wash. on Real Prop., p. 288. And not only must the deed be sealed, but the seal must be affixed by some one authorized to affix it. *Idem*, p. 289.

The conveyance of real estate is one of the most solemn and important acts a corporation is called upon to perform, and if the seal is required for any purpose, it is difficult to conceive of any other act for which its use is more necessary. If it was intended to abolish the use of seals by corporations

altogether, why was the saving or excepting clause inserted in the Act? And if the seal is to be required in any case, in what case is it more important than in a conveyance of real estate, either absolutely or under mortgage?

Prior to the Code, the use of an individual or private seal worked various effects, as for example: If not under seal, it was necessary to aver and prove a consideration in all contracts, oral or written, except in cases of bills and notes. *Roper* v. *Stone*, Cooke, 499; *Shelton* v. *Bruce*, 9 Yer., 26; *Read* v. *Wheeler*, 2 Yer., 55; *Brown* v. *Parks*, 8 Hum., 297. The consideration of a sealed instrument could not be inquired into in an action of law. *Nirens* v. *Merrick*, 1 Tenn., 314; *Coleman* v. *Sanderlin*, 5 Hum., 563. And the statute of limitations was different in cases of sealed and unsealed instruments. *Anderson* v. *Settle*, 5 Sneed, 203; *Thompson* v. *Thompson*, 2 Head, 407, and other cases. A release was required to be under seal. *Evans* v. *Pigg*, 3 Cold., 397, 398; *Simpson* v. *Moore*, 6 Bax., 373. A sealed contract merged one not under seal. *Nunnelly* v. *Dunn*, 1 Yer., 31; Bishop on Contracts, Sec., 31. A person could not bind another by seal unless authorized by seal. *Nunnelly* v. *Dougherty*, 1 Yer., 27; *Turberille* v. *Ryan*, 1 Hum., 113. Creditors under sealed instruments had certain preferences at common law in estates of deceased persons. Anson on Contracts, p. 48.

The application of this section of the Code, No.

2478, finds ample scope in altering these rules derived from the common law in regard to contracts and conveyances by individuals, without extending it to the deeds and other solemn instruments to be executed by corporations, and, in view of the saving clause excepting corporation seals, we cannot infer that the Legislature intended to abolish the use and necessity for corporate seals altogether.

We are of opinion that this Act, 2478 M. & V. Code, does not change the rule of the common law requiring corporations to use their seals in all conveyances of real estate, and a conveyance not under seal, made by a corporation, does not vest a legal title in the grantee, except, it may be, cases of corporations created under the Act of 1875, and which have no common seal, in which case that Act provides that, in such corporations, having no common seal, the signing of the name of the corporation, by any duly authorized agent, shall be legal and binding. See Act 1875, Ch. 142, Sec. 5; M. & V., § 1704.

The corporation now in question was not created under the Act of 1875, but under the Acts of Congress providing for national banks, and we are not called upon to say whether, under this Act of 1875, a corporation may convey without seal in any case. That question is in no way involved in this case. We are of opinion that the deed in question in this case was not properly signed nor sealed, and hence did not vest the legal title to the lots

in controversy in complainants, but only operated to create in them an equitable interest and title. Pomeroy's Eq. Juris., Sec. 418; Devlin on Deeds, Sec. 246; *Beardsley* v. *Knight*, 33 Am. Dec., 193; *Frost* v. *Wolf*, 19 Am. State Rep., 761, 764; *Allis* v. *Jones*, 45 Fed. Rep., 148; *Binkly* v. *Bethel*, 9 Heis., 786.

Complainants base their right of recovery in this case upon the claim that they have a legal title to the lots, and they repudiate the idea that they have only an equitable interest or estate. This being so, to entitle them to recover, they must show a perfect legal title. And this is true, whether their suit is brought in a Court of equity or law, and they cannot recover upon any equitable title that may appear from the proof. Code of Tenn. (M. & V.), § 3953; *Langford* v. *Love*, 3 Sneed, 308; *Rogers* v. *Cawood*, 1 Swan, 146; *Campbell* v. *Campbell*, 3 Head, 325; *Walker* v. *Fox*, 1 Pick., 160; *Evans* v. *Belmont Land Co.*, 8 Pick., 348.

It is useless to pass upon the validity of defendant's title, as complainants must recover, if at all, upon the strength of their own title, and not upon any supposed or real weakness in their adversary's title.

It is next insisted that the lots in controversy were redeemed or repurchased by complainants for Joel A. Hayes, Sr., and that complainants have been repaid the amounts advanced by them for that purpose, and have now no real, beneficial interest in

the lots. Complainants testify that such is not the case, but it is contended by defendants that entries of record, contemporaneous with the transactions, sustain this insistence. It appears that, after these lots were recovered by complainants, they conveyed two of them to Mrs. Emily Hayes, widow of O. B. Hayes, in satisfaction of a debt due the estate of her husband. This deed to Mrs. Hayes was executed by complainants and Joel A. Hayes, Sr., and recites on its face that the bank has permitted A. E. Garrett and Joel A. Hayes, Jr., to repurchase said lots for $700 cash. Very soon after this, a decree was entered in a foreclosure suit, brought by Mrs. O. B. Hayes, to collect her debt from Joel A. Hayes, Sr., and, in that decree, it was recited that "it appeared to the Court that Joel A. Hayes, Sr., by his son, Joel A. Hayes, Jr., and his son-in-law, A. E. Garrett, had obtained the title to said lots from the bank," etc. It is said that complainants were not parties to that suit, and are not bound by the recitals in that decree, and that it was incompetent as evidence against them.

While it is true the complainants were not parties of record to that suit, we think it was competent to introduce the record as a contemporaneous transaction, showing how all the parties, and especially Joel A. Hayes, Sr., regarded the transaction with the bank. The language of the deed from complainants to Mrs. Hayes supports the contention of defendants that the lots were being regained from

the bank in the interest of Joel A. Hayes, Sr., and this is further strengthened by the testimony of Gen. G. P. Thruston, the attorney for the bank, and by other facts in the record. The language used in the deed that the bank has permitted complainants to repurchase said lots, is inconsistent with the idea that the bank was selling the lots to complainants as an independent transaction, and consistent with the idea that they were being regained in the interest of the debtor, and that the permission to repurchase was a concession to him on the part of the bank. The deed from the bank is, moreover, a quitclaim, and not a warranty deed, as would, no doubt, have been demanded by an independent purchaser.

On the same day this deed was made to Mrs. Emily Hayes, and the same day the deed was made to complainants by Mr. McLaughlin, Joel A. Hayes, Sr., executed to complainants a mortgage to secure them the sum of $700, which they had advanced for him, and other amounts, and had the same recorded. There can be no doubt that this $700 is the same $700 advanced to the bank to regain the lots. Complainant Garrett states that this mortgage was executed without his knowledge, and sent to him, after registration, by mail; whereupon, he canceled it, and returned it satisfied. It stood, however, on the Register's books unsatisfied and as a subsisting mortgage until July 1, 1883, when Joel A. Hayes, Jr., acknowledged satisfaction of all debts secured to him

by it, and, on May 22, 1884, complainant, Garrett, executed a similar satisfaction and release, and the same was registered.

It further appears that, on January 19, 1878, or about two months after complainants had made the transaction with the bank, a judgment by motion was taken against H. M. Hayes for the amount of the judgment stayed by Joel A. Hayes, Sr. This judgment was taken in the name of Joel A. Hayes, Sr., * * * and recites that complainants had paid and advanced the amount to the bank for J. A. Hayes, Sr., necessary to redeem the lots, and hence the judgment was taken for their use and benefit. Complainant Garrett caused execution to issue on this judgment and sent it to Williamson County, where it was satisfied by a sale of H. M. Hayes' lands, and the money realized therefrom was paid over to complainant Garrett, amounting to $608, and a receipt was indorsed on the execution docket therefor signed by A. McClain, attorney for J. A. Hayes, Jr., and A. E. Garrett. Complainant Garrett sent part of this money to complainant Hayes, Jr., and retained a part himself, and states that it was applied to other debts owing him by his father-in-law, Joel A. Hayes, Sr. Complainant Garrett shows that this judgment was taken without his direction or knowledge by the attorney of the bank, but it appears that it was in accordance with instructions to his own attorney, McClain, who otherwise would have taken the same judgment, in the

same way, for the use of complainants at complainant Garrett's request. Learning that the judgment had already been taken by the bank's attorney, and in the manner suggested by him, that is, for use of complainants, complainant accepted the benefits of it and proceeded, as before stated, to collect it.

From the date of the deed to Mrs. Emily Hayes, in 1877, down to the death of Joel A. Hayes, Sr., in August, 1890, we hear nothing of complainants in connection with these lots. During this period of thirteen years they paid no taxes on them, and exercised no public acts of ownership, and made no claim of a public character except the deed, which they had registered soon after obtaining it. In 1887, about three years before Joel A. Hayes, Sr., died, the lots made a phenomenal rise in market value, but this seems to have aroused no interest or concern in complainants. In August, 1890, Joel A. Hayes, Sr., died, and soon thereafter his son, W. O. Hayes, ascertained the condition of the title to these lots, and wrote to complainant Garrett. Soon thereafter complainant Garrett came to Nashville, and went to the abstract office and had a conference with its manager, asking many questions in regard to the title to the lots, and within a month thereafter this bill was filed.

Upon a careful examination and analysis of the proof in this case, we are convinced that, whether the transaction between complainants and the bank is called a repurchase or a redemption, it was, in

any event, an arrangement made by the parties with the bank to regain the lots for the use and benefit of Joel A. Hayes, Sr., and in order to aid and assist him in his financial troubles; that the amount paid was slightly more than the debt bid on the lot, is accounted for by the explanation of General Thruston, the bank attorney, that the costs and attorney's fees incurred about the sale were included in the amount required to be paid. We are also convinced that complainants were partially reimbursed of the amount paid out by them from the collection made from H. M. Hayes, and the balance was released to Joel A. Hayes by the complainants when they satisfied the mortgage which they had upon the lots in 1883 and 1884. It may be that when the lots 11 and 20 were conveyed to Mrs. Emily Hayes to satisfy her debts, the lots Nos. 23 and 41 were intended to go to Mrs. Cheatham in satisfaction of her debt *pro tanto* or *in toto*.

The conduct of the parties toward each other strengthens this conclusion. While Joel A. Hayes, Sr., was involved to insolvency, he was desirous that his brother's estate should not suffer loss by him, and complainants, as his son and son-in-law, were co-operating with him to avoid such loss. The record discloses that Joel A. Hayes, Jr., was continually sending money to his father, contributing to his support and maintenance and that of the family so long as the father lived, and, when he died, assuming the entire cost of his burial, exhib-

iting a touching instance of filial devotion, for which he expected and received no return, but, on the contrary, forgave his father all that he had advanced for him to maintain his credit and standing and to support his family. It appears that these matters were not carried on on a business basis, but one purely of devotion of a son to a father; and if the property had remained that of the son, it would, when the rise in values came, most likely have at once been turned over to the father. It is only on this basis that we can reconcile the delay and laches of complainants in bringing suit, or, at least, manifesting some interest in this property, which appears to have faded out of their recollection. We think any conflict between the testimony and the cotemporaneous deeds and decrees may be ascribed to defects in memory in regard to events happening more than thirteen years before the action commenced, during which time the parties appear to have paid no attention to the matter.

Both upon the defects in complainants' title and the merits of the case, we think they must fail in their suit, and the decree of the Chancellor is reversed, and bill dismissed, at complainants' cost.

GOODWIN *v.* GUILD.

(*Nashville.* March 1, 1895.)

MALICIOUS PROSECUTION. *What is not.*

The Mayor of a city is not liable for malicious prosecution in attempting to enforce an unconstitutional ordinance which had not been judicially declared invalid, although opinion as to its validity was divided, if he acted in good faith in the discharge of his official duty as he understood it, and without malice, oppression, or wanton disregard of the rights of the person prosecuted.

Case cited: 3 How., 87, 98.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County. N. D. MALONE, Sp. J.

COLYAR, WILLIAMSON & COLYAR, and J. W. GAINES for Goodwin.

SMITH & DICKINSON, BARTHELL & KEEBLE, and J. D. WADE for Guild.

WILKES, J. This is an action for false imprisonment and malicious prosecution. It was tried before a special Judge in the Court below without the intervention of a jury, and a judgment rendered

for $1,500—$1,000 of which were awarded as actual and $500 as exemplary damages—and defendant has appealed, and assigned many errors, which need not be treated in detail.

A short statement of the facts in the case is that plaintiff entered into a contract with the Board of Public Works and Affairs to construct a sewer in the city of Nashville. This contract, while dated April 14, 1892, appears to have been executed on the part of the board on April 18, 1892, and was in pursuance of a public letting to the lowest responsible bidder had before that date, and about April 2, 1892. The plaintiff secured the contract, and expected and intended to use convict labor in its execution; and there is proof tending to show that this fact was known to the Board of Public Works and Affairs at the time the contract was let to the lowest bidder. After the public letting on the second of April, the Mayor and City Council of Nashville, on the fourteenth day of April, 1892, passed an ordinance making it unlawful for any person to use or employ convict labor on any work to be executed under contract with the city of Nashville, under a penalty of fifty dollars for each violation. Defendant Guild was Mayor of Nashville, and, being notified that plaintiff was using convicts upon the work under his contract with the city, on April 23, 1892, went before the Recorder, and procured Mr. Cleary, Street Overseer, to make the necessary affidavit that plaintiff was violating the

city ordinance by working convicts in the city limits under his contract; and thereupon the Recorder and Judge of the City Court, at the suggestion of the said Guild, issued a warrant for plaintiff's arrest, which was given to a member of the police force, who met the plaintiff, read the warrant to him, and cited him to appear before the Recorder on the next morning, which he agreed to do. No actual arrest was made by touching the plaintiff or taking him into custody, and no bond for his appearance was required. He did appear, was fined fifty dollars, appealed to the Circuit Court, and was in that Court tried and acquitted December 15, 1892, on the ground that the city ordinance was in contravention of an Act of the General Assembly, and hence was void, and gave no authority for plaintiff's arrest. Thereupon, November 16, 1893, plaintiff brought this action for damages for false imprisonment and malicious prosecution against the defendant personally, and against the members of the Board of Public Works individually, and the Mayor and City Council of Nashville. On demurrer, the action as to the Mayor and City Council was dismissed. The cause was tried, and resulted in the acquittal of the members of the Board of Public Works, and in judgment against defendant, Guild, as before stated.

It is conceded that the ordinance of the city under which the Mayor proceeded was in contravention of the law, and was, therefore, void, but, at the time these proceedings were taken, it had not been so

declared by any judicial tribunal, and defendant insists that he acted in perfect good faith in attempting to execute the ordinance as it was passed and stood upon the books of the city, and was actuated by no malice. The Circuit Judge, in his written opinion, found that defendant was actuated by no feelings of malice.

It is said, however, that, previous to this time, the Board of Public Works had considered this ordinance and come to the conclusion that it was illegal, and had declined to enforce it, and so notified the Mayor, and such is the fact. It is also said that the city attorney had given an opinion adverse to the legality of the ordinance, and that this had been sent by the board to the Mayor along with a record of their action declining to enforce the ordinance. The proof in regard to this opinion is quite indefinite. It appears that such opinion was prepared by J. C. Bradford for the city attorney, Anderson, who felt himself incompetent to pass upon the matters, but at whose instance it was prepared, or to whom it was given, or by whom it was called for, does not definitely appear from the record. The defendant states emphatically that it was not called for by him, or given to him, and that he never saw it; but, on the contrary, that he applied to the city attorney for an opinion, which the regular city attorney, Anderson, declined to give, because of relationship to some party indirectly interested. The opinion of the Board of Public Works had no

judicial force, but was merely the expression of a divided board upon a legal question, which they could pass upon for themselves, but could not settle for anyone else, and the record wholly fails to fix the defendant with the receipt of the opinion of the city attorney, or the special attorney, whose opinion appears to have been given and afterwards lost in some unexplained manner. It does appear that there was a division of opinion as to the validity of the ordinance, and defendant states that his only object was to test the law and execute it, if valid, and that he had no other motive. It does not appear that he took any part in the proceedings after they were first instituted, but merely set on foot the proceedings to test and execute the ordinance. It is evident that this void ordinance could not justify the arrest of the plaintiff and his prosecution, still, it was the duty of the Mayor, as the chief executive of the city, to see its ordinances enforced, and, so long as he acted in good faith, and with no malice or improper motive, he cannot be held personally liable for a mere error in judgment. If he took advantage of his official position to oppress the plaintiff, either from ill will towards him, or because of any other improper motive, he would be liable.

The doctrine is tersely stated in *Kendall* v. *Stokes*, 3 How. (U. S.), 87, 98, by Chief Justice Taney, in these words: "A public officer is not liable to an action if he falls into an error in a case where the act to be done is not merely a ministerial one, but

is one in relation to which it is his duty to exercise judgment and discretion, even though an individual may suffer by his mistake."

In Bishop on Noncontract Law, Sec. 787, it is said: "By the express or implied terms of an officer's authority, he is to act honestly, carefully, and after the dictates of his own judgment, which, of necessity, being a human judgment, may err; therefore, when he has done what is thus commanded, whether the result is correct or not, he has exactly discharged his duty, and the law which compelled this of him will protect him, whatever harm may have befallen individuals."

In 14 Am. & Eng. Ency. of Law, p. 41, it is held that "public officers, called upon to act officially, may be held liable for a malicious prosecution upon the same grounds as other persons. But malice and want of probable cause ought very clearly to appear in such case. The presumption being strongly in their favor, mere ignorance of the law, or overpersuasion by others, is not sufficient." While we would not be understood as going to this latter length, still it will not do to apply the same strict rules of liability to an executive officer, whose duty it is to see the laws executed, if he makes a mistake in judgment, that would be applied to an individual who has no public duty to perform in executing its laws. To hold this strict rule would paralyze the arm of every executive and peace officer; and while such officer, for any wanton or malicious

abuse of legal process which is set on foot for the oppression of a citizen, must be held liable to the same or possibly a greater extent than a private individual, still there must be undoubted evidence of malice, oppression, and wanton persecution, with the absence of all probable cause or excuse, to hold a public official liable for errors in the execution of his official duties.

We cannot concur in the suggestion that the control of the police, and the enforcement of this ordinance against convict labor, rested exclusively with the Board of Public Works. While it was made their immediate duty to execute the ordinance, the Mayor was not thereby relieved, as chief city executive, from his duty under the charter to see this, as well as all other ordinances, enforced.

The management of the penitentiary is vested in the Superintendent, Warden, and other officials in immediate charge, and it is their primary duty to see the laws enforced, but the Governor of the State, as chief executive, is not thereby relieved from the duty of seeing that the laws in regard to the penitentiary and its convicts are enforced. He can neither delegate this duty to the prison officials nor can they take it from him.

The action taken by the Mayor was not, in the strict, technical sense, a criminal prosecution against the plaintiff. As was said in *Sparta* v. *Lewis*, 7 Pick., 374, "it is not a trial between the State and defendant, nor on a presentment or indictment by

and before a jury; but it is in the nature of a suit for debt. It is not a prosecution, but a suing in Court to recover a penalty for the violation of a city ordinance." It in no sense imputed to the plaintiff any corrupt, infamous, or degrading act, or any moral turpitude, but simply a disregard of an ordinance standing upon the records of the city; and, while the warrant was in form an order for the arrest of plaintiff, still it was executed by simply reading it to him, and citing him to appear before the Recorder the next morning, which he agreed to do. He was not taken into custody, was subjected to no indignity, was not required to go to jail, or even give a bond for his appearance before the Recorder. He was not restrained of his liberty or hindered in going where he pleased. He was virtually unknown to defendant, who had no personal ill will towards him. While this is not necessary, still it is a circumstance throwing light upon the question whether defendant had any improper motive of any kind in doing what he did.

We do not mean to be understood as holding that this ordinance was valid. It has already been held to be invalid. But, while it stood among the ordinances of the city, the Mayor cannot be held liable personally if, in good faith, he attempted to execute the same in the discharge of his duty as he understood it, and in the absence of any malice, oppression, improper motive, or wanton disregard of the plaintiff's rights, and we are unable, from this

record, to find any evidence of such malice, oppression, or improper motive on the part of the defendant.

For these reasons the judgment of the Court below is reversed, and the cause dismissed at plaintiff's cost.

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117 373

LEA *v.* STATE.

(*Nashville.* March 2, 1895.)

1. CRIMINAL EVIDENCE. *Of defendant's character. Charge of Court.*

Where, in a criminal case, the proof shows the defendant's character good before, but bad after, he was charged with the crime for which he is on trial, the Court should charge the jury as follows: "The character of the defendant before the present charge can be looked to as a witness for or against him as to his guilt or innocence, but his character since then can only be looked to in determining the amount of credit due him as a witness. and cannot be looked to as a witness as to guilt or innocence." (*Post. pp. 496, 497.*)

2. CRIMINAL PRACTICE. *Oath of officer.*

The recital of record in a felony case that the officer in charge of the jury was "sworn to wait on said jurors," without more, is insufficient. If the record undertakes to set out the oath, it must be done fully. The safer practice is to recite merely that the officer was sworn "according to law," or "as required by law." (*Post, pp. 497, 498.*)

Cases cited and approved: Buxton *v.* State, 89 Tenn., 216; Lancaster *v.* State, 91 Tenn., 267.

FROM WILSON.

Appeal from Circuit Court of Wilson County. W. C. HOUSTON, J.

THOMPSON & CANTRELL for Lea.

Attorney-general PICKLE for the State.

Lea *v.* State.

CALDWELL, J. Sam Lea was convicted of the crime of petit larceny, and has appealed in error. After testifying in his own behalf, he introduced three witnesses as to his general character. All of these witnesses said, upon examination in chief, that they knew the defendant's character, and that it was good up to the time of this charge; and they likewise said, on cross-examination, that his character is bad since this charge, and that they would not now give him credit on his oath, though they would have done so before this charge was brought against him.

With respect to that testimony, the Circuit Judge instructed the jury as follows: "When a defendant puts his character in issue before you," that character becomes a witness in the case. If it be shown to be "good, it is a witness for him, and if bad, it is a witness against him; and such character, good or bad, is taken into consideration with the other evidence in the case in determining his guilt or innocence."

This instruction would be correct in the ordinary case, in which the witnesses, speaking in regard to the defendant's character, are confined to that character as existing at the time the charge was made against him; but it is erroneous when applied to testimony with respect to his character both before and after the charge was made, as in this case.

The defendant's character, whether good or bad, since the charge, cannot affect the question of his guilt or innocence of the crime imputed to him.

His character since the charge may well go to his credibility as a witness in his own behalf, because existing at the time he testifies; but it does not reach or illustrate the question of his guilt or innocence.

Lea's counsel sought to have the proper distinction made by the following request: "The character of the defendant before the present charge can be looked to as a witness for or against him as to his guilt or innocence, but his character since then can only be looked to in determining the amount of credit due him as a witness, and cannot be looked to as a witness as to guilt or innocence." The instruction thus requested was erroneously refused.

The record shows that the trial of this case in the Court below occupied two days; and the only entry in reference to the oath administered to the officers in charge of the jury during the intervening night, recites simply that they were "sworn to wait on said jurors until the meeting of the Court to-morrow morning, at 8:30 o'clock." This entry is fatally defective. The oath shown to have been taken contains hardly a single element of that required by law. It contains not a word involving any kind of restraint upon the public, upon the jury, or upon the officers themselves; and only constrains the officers "to wait on the said jurors." In every felony case the record should show affirmatively that the requisite oath was administered to the officer or officers in charge of the jury pending the trial.

This may be done by spreading the oath at large upon the minutes of the Court, or by the short recital that the officer or officers were sworn according to law, or as required by law. *Buxton* v. *State*, 89 Tenn., 216; *Lancaster* v. *State*, 91 Tenn., 267. The latter is the safer practice. Neither was done in this case. The record before us purports to set out the whole oath given, and no presumption can be indulged that a fuller, or sufficient oath was in fact taken.

Reverse and remand.

JOHNSON *v.* STATE.

(*Nashville.* March 2, 1895.)

1. RETAXATION OF COSTS. *Proof must show services rendered.*

Retaxation of costs, so as to embrace omitted fees, will not be allowed unless it shall be made to appear that the services for which the fees are claimed were performed. The statements of the petition for retaxation, and of the order made thereon setting out the items, do not, without more, afford evidence to justify retaxation. (*Post, pp. 500, 501.*)

Code construed: § 5269 (M. & V.); § 4517 (T. & S.).

2. FEES. *Not allowed salaried city officers, when.*

The salaried Recorder and policemen of a city, invested by law with the jurisdiction and power of justices and constables, respectively, are not entitled to receive, in addition to their salaries, the fees fixed by law for justices and constables for like services. (*Post, pp. 501–504.*)

Code construed: §§ 5269, 6433, 6434, 5316, 5321 (M. & V.); §§ 4517, 5561, 5562, 4564, 4571 (T. & S.).

Acts construed: Acts 1883, Ch. 114.

Case cited and approved: Morgan *v.* Pickard, 86 Tenn., 208.

Cited and distinguished: Porterfield *v.* State, 92 Tenn., 289.

FROM DAVIDSON.

Appeal from Criminal Court of Davidson County. J. M. ANDERSON, J.

A. J. CALDWELL for Johnson.

Attorney-general PICKLE and E. J. WICKWARE for State.

CALDWELL, J. The question for decision in this case grows out of the claim made by municipal officers of the city of Nashville to certain fees.

The defendant, John Johnson, was indicted, tried, convicted, and sentenced to imprisonment in the State penitentiary for the crime of larceny. At the next term, the case "came on to be heard upon a motion of James T. Bell, City Recorder, and police officers Sidebottom and Turner, to retax the cost, so as to allow said Bell his fees for issuing warrant of arrest, docketing the case in the City Court, issuing subpœnas for witnesses, rendering judgment in the City Court, and issuing mittimus, and so as to allow officers Sidebottom and Turner fees for arrest of defendant under the warrant issued by said Bell." The motion was disallowed, and the parties making it have appealed in error.

Are the plaintiffs in error entitled to the fees they claim? We think not, for more than one reason.

1. This record fails to show that they, in fact, rendered any services in connection with the case, or that the defendant was ever arrested and taken before the City Court. It is true that the transcript contains a petition in which the various items of service enumerated in the motion, and the several grounds upon which a retaxation of cost is sought, are distinctly set out; but that does not make a

case. The petition is not proof. Neither the recitals of the motion nor the averments of the petition can be taken as proof that the services enumerated, or any part of them, were really performed; and, yet, the case of plaintiffs in error is entirely without any other support in the record before us.

2. Fees or costs are not allowable in any case, unless expressly provided by law; and there is no such provision for those claimed in this case.

"No officer is allowed to demand or receive fees, or other compensation, for any service further than is expressly provided by law." Code (M. & V.), § 5269.

"Officers are entitled to no other fees in criminal cases except such as are expressly provided by law; and in no case are they entitled to payment from the State or county unless expressly allowed." *Ib.*, § 6433; *Morgan* v. *Pickard*, 86 Tenn., 208.

Justices of the Peace are expressly allowed fees for such services as are claimed to have been rendered by the City Recorder in this case (Code, M. & V., 5298, 5300), and Constables are expressly allowed fees for such services as are claimed to have been performed by the police officers in this case. *Ib.*, §§ 5321, 5316.

By the charter of the City of Nashville, it is provided that the City Recorder "shall have the power, and exercise the functions of, and have concurrent jurisdiction with, a Justice of the Peace" (Acts 1883, Ch. 114, Sec. 57), and that the

"metropolitan police shall possess all the common law and statutory powers of Constables, except for the service of civil process." *Ib.*, Sec. 50.

It does not follow, however, that such city officers are entitled to demand and receive the fees allowed to Justices of the Peace and Constables. No fees are mentioned in the charter. The city officers referred to are given the powers of Justices of the Peace and of Constables, respectively, to the extent mentioned, but they are not given the same compensation. Their compensation is provided for, not in fees, but by fixed salaries. Acts 1883, Ch. 114, Secs. 16, 32, 49. Having fixed salaries, it is neither strange nor unjust that no fees are provided for them.

Section 6434 of the Code (M. & V.) does not authorize the allowance of the fees claimed in this case. The words of that section are as follows: "If any of the duties in this and the corresponding title of Part III. specified are performed by other officers than those therein named, whose duty it is to perform the same, such officers are entitled to the same fees, and in the same manner as there named."

Among the officers named in the two titles of the Code here referred to, are Justices of the Peace and Constables; and among the "duties" therein imposed upon them are included such as are claimed to have been performed in this case by the plaintiffs in error; still, that is not enough to bring the latter within the operation of that statute. To

have that effect, they must go further and show that, in rendering the services in question, they performed duties devolved by law exclusively upon those other officers, and not upon themselves. This cannot be done; for it is as much the legal duty of the city Recorder and policemen as of Justices of the Peace and Constables, "to preserve public peace, prevent crime, detect and arrest offenders" within the territorial limits of the city. Acts 1883, Ch. 114, Secs. 51, 52, 57.

In rendering the services mentioned in the motion and petition in this case (if they were rendered), the plaintiffs in error performed their own duties, and not the duties of other officers. Had they done less, they would have failed in the performance of their full duty to the city. Having done no more than required of them by the city, they cannot successfully assert that they performed duties that should have been performed by others, or that they are entitled to compensation beyond that provided by the city.

The decision in *Porterfield* v. *State*, 92 Tenn., 289, is not in conflict with that announced in this case. In that case, it was decided, not that police officers were entitled to fees for the service of criminal process merely, but that they were civil officers within the meaning of the Acts of 1837–8, Ch. 137, and that, as such, they were entitled to the statutory reward thereby offered to "any civil officer who shall arrest and prosecute to conviction

and punishment any person guilty of any of the offenses enumerated" in that Act. It was the duty of the police officers in that case, as it was their duty in this, to arrest the offender; and for that service, without more, they would have been entitled to no fee.

Affirm the judgment.

BOYD *v.* STATE.

(*Nashville.* March 3, 1895.)

1. WITNESS. *Infamy.*

The infamy that excludes the testimony of a witness must be proved by the record, or authenticated copy thereof, showing his conviction and sentence for an infamous crime. The witness' admission on the stand, or other oral testimony, is incompetent to prove infamy. (*Post, pp. 508–512.*)

Cases cited: 99 Mass., 420; 7 Ired., 225; 3 McL. C. C., 325; 3 Wash. C. C., 99; 2 Carr. & K., 266; 24 N. Y., 298; 42 N. Y., 280; 95 N. Y., 541; 118 N. Y., 661; 72 N. Y., 393; 79 N. Y., 594.

2. PRACTICE. *Exclusion of evidence.*

It is error to withdraw the testimony of a witness, who admits his infamy on the stand, over the demand of the party to be thereby affected, that record evidence of the witness' infamy should be first produced. (*Post, pp. 506–509.*)

FROM DAVIDSON.

Appeal from Criminal Court of Davidson County. J. M. ANDERSON, J.

JOSEPH G. BRANCH for Boyd.

Attorney-general PICKLE for State.

SNODGRASS, Ch. J. The plaintiff in error was indicted for housebreaking and larceny. He pleaded

"not guilty," was tried, convicted, and sentenced to imprisonment in the penitentiary for a term of three years, and thereupon appealed in error.

There was evidence upon which the conviction might have been rested, though it is not very conclusive. The material error assigned is in the exclusion of the testimony of Belton Boyd, witness of defendant. Boyd gave evidence to the effect that defendant found certain of the property lost, at the time that charged to have been stolen was taken. Turned over to the State for cross-examination, he was asked by the District Attorney "if he had not been convicted of larceny, and had not served his sentence on the county farm." The witness answered that he "had been convicted of larceny in this Court, and had served his sentence in the county workhouse." The District Attorney then moved that the testimony of this witness be excluded, and it was excluded, or withdrawn, by the Court from the consideration of the jury, and witness directed to stand aside. The defendant's counsel demanded that, before the exclusion of the witness' testimony, record evidence of his conviction be produced by the State. The Court ruled the statement of the witness, himself, as to his infamy, was *prima facie* evidence of his incompetency, and declined to compel the production of the record.

To this ruling the defendant excepted. It is not insisted, by the Attorney-general for the State, here that this action of the Circuit Judge would not have been erroneous had the evidence of the witness been

excepted to formally and specifically when made, but it is assumed that the manner in which the question is raised, as herein stated, was not equivalent to such an exception, and that there is no error in the action of the Circuit Judge because of the want of such exception, even if there is error at all, which the Attorney-general does not concede. We are of the opinion, however, that the exception was sufficient, and that it was error to admit this evidence, even as *prima facie*, when the objection was made in the form it was, that the record and judgment of conviction be required to be produced before exclusion of the witness.

Passing the question as to whether the State could rely on an infamous witness to prove his own infamy, and thus establish that he was not competent to testify at all, and the question whether such statement of such witness could be treated as *prima facie*, we think it could not be accepted at all, over objection made, when the exclusion was insisted upon, that the record of conviction should be produced.

The witness does not say, in fact, that there was any sentence, or judgment of infamy, rendered; at most, his statement to this effect could be treated as only inferentially equivalent to such statement, giving it its fullest weight. The term "convicted," used in the question, is not treated in this connection as synonymous with that of judgment and sentence of infamy. A mere conviction, without a judgment rendered upon it, is not sufficient. 10 Am.

& Eng. Ency. of Law, p. 606, and cases cited, note 4.

In the case of *Commonwealth* v. *Gorham*, 99 Mass., 420, this distinction is further illustrated. It was there declared to be the rule of the common law that the production of the complete record, including the conviction technically so called, and the final judgment thereon, was necessary, in order to show that a witness offered was incompetent on account of infamy. This rule is founded on the reason that "it is always within the power of the Court, on motion in arrest, or for a new trial, to set aside a verdict illegally or improperly rendered, at any time before judgment, and the prosecution may, in the end, result in the defendant's acquittal."

So, in North Carolina, it is decided that a person is not rendered incompetent to give evidence by a conviction of crime, but only by the judgment on the conviction. 7 Ired., 225; Bull. N. P., 392. And see cases cited in Am. & Eng. Ency. of Law, Vol. X., p. 607, note 7. So, one convicted of an infamous offense is a competent witness until after sentence has been passed. *United States* v. *Dickinson*, 3 McL. C. C., 325; *United States* v. *Brochius*, 3 Wash. C. C., 99.

But if we treat the remainder of the question in addition to that as to "whether he had been convicted of larceny," which was, "if he had not served his sentence on the county farm," in connection with the answer of the witness that he had been convicted,

and had served his sentence in the county workhouse, as equivalent to the offer to prove, and actual testimony of the witness to both conviction and sentence, we are still confronted with the difficulty that it is insufficient and incompetent.

Mr. Phillips says: "In ordinary cases, a conviction or sentence must be proved by the production of a record regularly drawn up." 2 Phillips on Evidence, 356. And in the case of *Rex* v. *Rourdon*, 2 Carr. & K., 266, it was adjudged that the evidence of a person who heard sentence passed upon the prisoner is insufficient to establish such record. Elsewhere it will be shown that conviction without sentence has been admitted, without objection, but in that event going only to credibility and not to competency.

Mr. Greenleaf says: "We have already remarked that no person is deemed infamous in law until he has been legally found guilty of an infamous crime, but the mere verdict of the jury is not sufficient for this purpose, for it may be set aside, or the judgment may be arrested on motion for that purpose. It is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify. And it must appear that the judgment was rendered by a Court of competent jurisdiction. Judgment of outlawry for treason or felony will have the same effect, for the party, in submitting to the outlawry, virtually confesses his guilt, and so the record

is equivalent to a judgment upon confession. If the guilt of the party should be shown by oral evidence, and even by his own admission (though, in neither of these modes can it be proved if the evidence be objected to), or by his plea of guilty, which has not been followed by a judgment, the proof does not go to the competency of the witness, however it may affect his credibility. And the judgment itself, when offered against his admissibility, can be proved only by the record, or, in proper cases, by an authenticated copy, which the objector must offer and produce at the time when the witness is about to be sworn, or, at farthest, in the course of the trial." Greenleaf on Evidence, Sec. 375.

Elsewhere, Mr. Greenleaf says: "But on the other hand, where the question involves the fact of a previous conviction, it should not be asked, because there is higher and better evidence which ought to be offered. If the inquiry is confined in terms to the fact of his having been subjected to an ignominious punishment, or to imprisonment alone, it is made not for the purpose of showing that he was an innocent sufferer, but that he was guilty, and the only competent proof of this guilt is the record of his conviction. Proof of the same nature, namely, documentary evidence, may also be had of the cause of his commitment to prison, whether in execution of a sentence or on a preliminary charge." Section 457.

In the notes it is said: "It is not, however,

allowable to show by the cross-examination of a witness himself, that he has been convicted of a crime, if the objection is made that the record of the conviction is the best evidence, unless, by statute, the conviction may be shown by cross-examination." Citing *Newcomb* v. *Griswold*, 24 N. Y., 298; *Real* v. *People*, 42 N. Y., 280; *People* v. *Irving*, 95 N. Y., 541; *Spiegal* v. *Hayes*, 118 N. Y., 661.

"The better rule now is, that on cross-examination, questions as to specific facts tending to disgrace the witness, and not questions as to accusations or charges, including indictments, may be asked on cross-examination, but the party asking them is bound by the answers of the witness." Citing the same cases in 42 and 95 N. Y., and *People* v. *Carsey*, 72 N. Y., 393; *Ryan* v. *People*, 79 N. Y., 594.

To this is added: "It may also be observed, as a further reason for not interrogating a witness respecting his conviction and punishment for a crime, that he may not understand the legal character of the crime for which he was punished, and so may admit himself guilty of an offense which he never committed."

Again, Mr. Greenleaf says: "The party, however, must have been legally adjudged guilty of the crime (speaking in reference to persons disqualified as infamous). If he is stigmatized by public fame only, and not by the censure of law, it affects the credit of his testimony, but not his admissibility as a wit-

ness. The record, therefore, is required as the sole evidence of his guilt, no other proof being admitted of the crime, not only because of the gross injustice of trying the guilt of a third person in a case to which he is not a party, but also, lest, in the multiplication of the issues to be tried, the principal case should be lost sight of, and the administration of justice should be frustrated. This ground of exclusion has been largely done away with by statutes, which will be found below in the note." Section 372 (15th Ed.).

Many cases on this subject, and the rule of several of the States in relation thereto, will be found in the tenth volume of the American and English Encyclopedia of Law, under the titles "Infamous Crimes" and "Infamy." A summary of the decisions and effect of the several cases is thus stated on page 609 of that volume: "The record of the conviction (meaning, of course, the conviction and the judgment thereon) is the sole evidence of infamy." Citing *Castelano* v. *Teyllon*, 2 Mart. N. & S. (La.), 466; *Commonwealth* v. *Gorham*, 99 Mass., 420; *Cushman* v. *Loker*, 2 Mass., 108; *People* v. *Whipple*, 9 Cow. (N. Y.), 707; *People* v. *Herrick*, 13 Johns. (N. Y.), 82; *Rex* v. *Castello Careinion*, 8 East, 77.

These authorities are conclusive against the exclusion of the witness, and the judgment of the Criminal Court must be reversed, and defendant remanded for a new trial.

*NASHVILLE TRUST CO. *v.* SMYTHE.

(*Nashville.* March 3, 1895.)

1. BILLS AND NOTES. *Rights of bona fide holders.*

Bona fide holders of promissory notes, secured by mortgage or vendor's lien, may hold the security, as well as the notes, unaffected by equities between prior holders and the mortgagor or vendor. (*Post, pp. 514–522.*)

Case cited and approved: 16 Wall., 271, 452.

2. SAME. *Assignment of.*

The assignment of notes secured by vendor's lien is governed by the same rule as the assignment of notes secured by mortgage. (*Post, p. 523.*)

3. SAME. *Assignees share pro rata.*

Assignees of several notes secured by mortgage or vendor's lien share pro rata, if there is nothing in the contract of assignment, or in the intention of the parties, to vary the rule. (*Post, pp. 523–527.*)

Cases cited and approved: Graham *v.* McCampbell, Meigs, 52; Roberts *v.* Francis, 2 Heis., 133; Andrews *v.* Hobgood, 1 Lea, 693; Ellis *v.* Roscoe, 4 Bax., 418; Ewing *v.* Arthur, 1 Hum., 537; Wicks *v.* Caruthers, 13 Lea, 353; 38 Am. Dec., 438.

4. SAME. *Priority among assignees.*

An agreement, in parol or writing, for preference in the security given to an assignee of a part of a series of negotiable notes secured by mortgage or vendor's lien, is valid as against subsequent innocent assignees of other notes in the series. (*Post, pp. 527, 528.*)

Case cited and approved: Hicks *v.* Smith, 4 Lea, 459.

5. SAME. *Assignment of mortgage or vendor's lien.*

The whole or any part of the mortgage or vendor's lien which secures negotiable notes may be assigned to secure any part of

* The authorities as to the priority of notes falling due at different times, secured by the same mortgage, are collected in a note to Horn *v.* Bennett, 24 L. R. A., 800.—REPORTER.

the notes which may be assigned, whether they be the first or last maturing, or the intermediate notes of the series. (*Post*, *p. 528.*)

6. SAME. *Not bona fide purchaser, when.*

An assignee of negotiable notes is not a *bona fide* purchaser as between himself and a prior assignee of other notes secured by the same mortgage or vendor's lien, with respect to rights in such security. (*Post*, *pp. 528–533.*)

Cases cited: 30 Minn., 4; 38 Maine, 496; 6 Cal., 478; 21 Vt., 331; 9 Pa. St., 32.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. T. H. MALONE, Ch.

GRANBERY & MARKS for Nashville Trust Co.

SMITH & DICKINSON for Fourth National Bank.

JAS. S. PILCHER for Crowninshield.

SNODGRASS, Ch. J. The question in this case arises under a bill filed July 30, 1892, by the Nashville Trust Co., as agent of Mrs. Martha M. Reed, against J. C. Smythe *et al.*, to enforce lien for the purchase money evidenced by negotiable promissory notes, executed as consideration for certain real estate, sold and conveyed on the twentieth of December, 1890, by defendant, Everett, to Mrs. Marlin. There were one hundred and twenty-six of these notes for $20 each, except the last, which was for $25, payable

by Marlin and wife to Everett. They bore interest from date, and matured, respectively, on the first day of each succeeding month after their date, until the end of one hundred and twenty-six months. They were secured by lien, expressly reserved on the face of the deed, of Everett to Mrs. Marlin. The complainant alleged that Mrs. Reed became the owner of forty of said notes, maturing on and after April 1, 1898. The bill was filed on her behalf, and that of all other holders of said notes, and sought to sell the real estate for the amounts due on all. Other note holders came in by petition, among them Miss C. L. S. Crowninshield, as guardian of C. G. and Caroline Underhill, and James S. Pilcher. They alleged that thirty of said notes, the thirteenth to the forty-second, inclusive, were assigned by said Everett to C. L. S. Crowninshield, as said guardian, on January 22, 1891, to secure the payment of $366.67 she, on that day, lent Everett; that at that time Everett was the owner of the entire series of notes, and that in the assignment of said thirty notes a preference was given over the other notes as to the vendor's lien to secure the same. The instrument giving the preference was in writing, and was as follows:

"NASHVILLE, TENN., January 22, 1891.

"Twelve months after date we promise to pay to the order of Miss C. L. S. Crowninshield, as guardian of C. G. and Caroline C. Underhill, three hundred and sixty-six dollars and sixty-seven cents

($366.67) for value received, having pledged on deposit as collateral security for the payment of this note thirty notes out of the series of one hundred and twenty-six notes given by A. J. Marlin and Ella May Marlin for lot number thirty-one in B. F. Brown's subdivision. Said thirty notes being numbers thirteen to forty-two, inclusive, of said series, and preference is given to said thirty notes over the other notes of the said series as to the vendor's lien to secure the same.

"(Signed)."

These petitioners show that the remainder of said sixty-five notes held by said guardian and Jas. S. Pilcher were also held as collateral on said loan for $366.67, and that all of said sixty-five notes, after satisfying said loan of $366.67, were the property of James S. Pilcher; and they asserted priority for the thirty notes. Proof was taken, and it appeared that, at the time of the execution of this instrument, Everett was the owner of all the notes of the series, all of which were transferred by him, before maturity for valuable considerations, after January 22, 1891, the date of the assignment quoted, and no other preferences were attempted to be given. The assignees of the other notes had no actual notice that the preference had been given as to the thirty notes assigned to Miss Crowninshield. The property was sold, and the amount brought was insufficient for the payment of all the notes. The Chancellor decreed that no preference should be al-

lowed to petitioner Crowninshield, guardian, and that all the note holders were entitled to share equally in the proceeds of the sale.

Petitioners Crowninshield and Pilcher appealed, and assign as error that the Court did not decree that, as to so much as was due to C. L. S. Crowninshield on said note for $366.67, she was entitled to be first paid out of the proceeds of the property, basing said assignment on the following propositions of law:

"*First.*—A vendor of lands who holds a series of notes given for the purchase money, where a lien is expressly retained upon the face of the deed, or a mortgagee who holds a number of notes which are secured by mortgage, in assigning one or more of such notes, has the power, by parol contract, to give to the assignee of such note or notes a preference as to payment out of the proceeds of the property, and the subsequent assignees of the other notes can take no higher rights than the vendor himself had; and citing *Menken* v. *Taylor*, 4 Lea, 445; *Hicks* v. *Smith*, 4 Lea, 457; *Hill* v. *McLean*, 10 Lea, 107; *Christian* v. *Clark*, 10 Lea, 630.

"*Second.*—The right and power of a vendor or mortgagee to give a preference as to the vendor's or mortgagee's lien by parol contract, in the assignment of a part of the secured notes made at a time when the vendor or mortgagee is the owner and holder of all the other notes, is a rule of property in Tennessee, citing *Nichols* v. *Levy*, 5

Wallace, 438; *Gelpecke* v. *Dubuque*, 1 Wall., 176; *Lee Co.* v. *Rogers*, 7 Wall., 181; *Chicago* v. *Sheldon*, 9 Wall., 50, and averring that the assignment of the notes in question, made January 22, 1891, when Everett held all other notes, wherein the preference was given to Miss Crowninshield, guardian, etc., was a contract, which, in effect, embodied the rule established in the cases in 4 and 10 Lea, cited above, and the same was and is a rule of property as to all such contracts made since said decisions."

The question of the case therefore involved in this assignment is, whether the assignee of the last assigned notes, they being negotiable promissory notes taken before maturity without actual notice of prior assignment and lien contract, and for valuable considerations, took them subject to any equity between the vendor and vendee of the land or the prior assignee of the first notes assigned. The assignment of error treats it as though it were only a question whether the assignor passed his rights; and it is assumed, that being settled affirmatively, that the subsequent assignee takes no higher right than the assignor himself had.

In support of this assumption and contention, appellants lay down two propositions: That the assignee of a mortgage or deed of trust does not occupy the position of an assignee of commercial paper, but takes and holds the same subject to all the equities that could be urged against it in the hands of the original owner. Citing *Olds* v. *Cummings*, 31 Ill.,

188; *Walker* v. *Dement*, 42 Ill., 272; *Cramer* v. *Willetts*, 61 Ill., 481; *Haskell* v. *Brown*, 65 Ill., 29; *Temple* v. *Whittier*, 117 Ill., 282; 7 N. E. Rep., 642; 44 N. W. Rep., 393; *Harrison* v. *Burlingame*, 48 Hun, 212.

And that the privileged character of negotiable paper does not extend to a mortgage by which it is secured. Citing *Oster* v. *Mickley*, 35 Minn., 245 (28 N. W. Rep., 710); *Johnson* v. *Carpenter*, 7 Minn., 176; *Hostetter* v. *Alexander*, 22 Minn., 559; *Blumenthal* v. *Jassoy*, 29 Minn., 177 (12 N. W. Rep., 517); *Richardson* v. *Woodruff*, 20 Neb., 132 (29 N. W., 308); *Crane* v. *Turner*, 67 N. Y., 437; *Horstman* v. *Gerker*, 29 Pa. St., 283; *Twitchell* v. *McMurtrie*, 77 Pa. St., 383; *Atchison* v. *Rutchie*, 3 Kans., 104; *Temple* v. *Whittier*, (Ill.) 7 N. E. Rep., 642; *Fermon* v. *Farmer*, 1 Har. (Del.), 32; Edwards on Prom. Notes, 165; 2 Daniel on Negotiable Inst., 432.

These propositions will be found advanced and maintained in many of the cases cited, to which more could be added, if necessary. They are based, to some extent, on a failure to discriminate between the case of a mortgage to secure a debt expressed merely in the face of the mortgage, or to secure accounts or other non-negotiable debts, and that of a mortgage to secure negotiable paper. Respecting those which hold that the same rule prevails where the debts secured are negotiable notes, they are based upon the theory that, although the mortgage notes

are negotiable, the mortgage itself is only assignable in equity, and, therefore, the assignee, having to resort to equity to enforce his rights, is compelled to do equity towards the mortgagor, and allow him all the rights of defense he had against the mortgagee. Courts so holding make no distinction between mortgages securing negotiable and non-negotiable paper.

But this view Mr. Jones, in his work on Mortgages (5th Ed., Sec. 838), says and shows is contrary to the general doctrine; and that the assignment of negotiable paper carries with it the security of the mortgage, and is unaffected by the equities between the mortgagor and the mortgagee. This latter he declares to be the generally accepted doctrine. (Sec. 840.) This has been recognized and declared by the Supreme Court of the United States. *Carpenter* v. *Longman*, 16 Wall., 271.

In that case, Judge Swayne, who delivered the opinion of the Court, calls attention to the distinction between the assignment of claims secured which were negotiable and non-negotiable, and to the confusion which has resulted from ignoring the character of claims secured by lien or mortgage. He thoroughly explodes the fallacy that an assignment of such negotiable paper for a valuable consideration, before maturity, without notice, does not carry to the assignee a right superior to that of the assignor. "The transfer of the note," he says, "carries with it the security, without any formal assign-

ment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien. All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid, the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action where such relation of dependence exists. *Accessorium non ducit, sequitur principale.*" This case was followed and approved by the same Court in the case of *Kenicot* v. *The Board of Supervisors of Wayne County*, 16 Wall., 452.

The whole subject will be found treated and cases collected in the nineteenth chapter of Mr. Jones' work on Mortgages before referred to. We do not deem it necessary to go into a more extended citation or discussion. It is sufficient to say, that we have no hesitation whatever in holding that such assignee of such notes does stand on higher grounds than the assignor, both in respect to the note assigned and to its mortgage security. If this were a question, therefore, merely between the assignee of the note and the payor of the note who had paid it to the assignor before the assignment, there would be no question that the right of the assignee would be superior, although the assignor's right would, of course, be inferior, or rather the assignor's right to collect the note out of the payor would not exist. It remains to inquire later on whether this concession is a settlement of the question involved in this case. Before reaching that question, however, it is proper to consider the rights of parties generally under such assignments of debts secured by vendor's lien or mortgage.

Counsel for appellants treats, properly, the assignment of notes secured by vendor's lien as governed by the same rule as the assignment of notes secured by mortgage, the two being analagous, and governed by the same principles, so far as the question under consideration is concerned; but, as has been shown, he erroneously treats the question as though there were no distinction in the character of claims as-

signed. On the general subject the law of the case is very fully cited, and the observation is just that there is, perhaps, no question on which there is greater conflict of authority than that relating to the rights of different assignees of a series of notes which are secured by mortgage, vendor's, or other liens. There are three different views taken by the Courts, and many decisions can readily be found to support each view.

The Supreme Court of Arkansas has clearly set forth this matter in the following language and citations: "One class holds that the notes shall be paid in the order of their assignment. *McClintic* v. *Wise*, 25 Grant, 448; *Cullum* v. *Erwin*, 4 Ala., 422; *Grigsby* v. *Hair*, 25 Ala., 327; *Waterman* v. *Hunt*, 2 R. I., 293. Another, that the notes should take precedence in the order of their maturity. *Mitchell* v. *Baden*, 36 Mo., 526, 530; *Sargent* v. *Howe*, 21 Ill., 148; *Vansant* v. *Allmon*, 23 Ill., 30; *Koester* v. *Burke*, 81 Ill., 436; *Bank* v. *Tweedy*, 8 Blackf., 447; *Doss* v. *Ditmars*, 70 Ind., 451; *Bank* v. *Bank*, 9 Wis., 57, 64; *McVay* v. *Bloodgood*, 9 Port. (Ala.), 547; *Richardson* v. *McKin*, 20 Kan., 346, 350; *Hinds* v. *Mooers*, 11 Iowa, 211; *Walker* v. *Schrieber*, 47 Iowa, 529; *Wilson* v. *Wayward*, 6 Fla., 171, 190; *Kyle* v. *Thompson*, 11 O. St., 616; *Winster* v. *Bank*, 33 O. St., 250. And a third class, that the proceeds should be applied pro rata in part payment of the several notes, irrespective of their dates of maturity or assignment.

Donley v. *Hays*, 17 Serg. & R., 400, 404; Cowden's Appeal, 1 Pa. St., 278; Mohler's Appeal, 5 Pa. St., 418, 420; Perry's Appeal, 22 Pa. St., 43, 45; *Crattan* v. *Wiggins*, 23 Cal., 16; *Dixon* v. *Clayville*, 44 Md., 575, 578; *English* v. *Carney*, 25 Mich., 178, 181; *McCurdy* v. *Clark*, 27 Mich., 445, 448; *Parker* v. *Mercer*, 6 How. (Miss.), 320, 324; *Cage* v. *Iler*, 5 Smedes & M., 410; *Pugh* v. *Holt*, 27 Miss., 461; *Andrews* v. *Hobgood*, 1 Lea, 693; *Bank* v. *Beard*, 49 Tex., 363; *Delespine* v. *Campbell*, 52 Tex., 4; *Wilson* v. *Eigenbrodt*, 30 Minn., 4; 13 N. W. Rep., 907; *Penzel* v. *Brookmire*, 51 Ark., 105 (10 S. W. Rep., 15)."

The rule adopted in Tennessee is that the assignees of the several notes share pro rata, if there is nothing in the contract of assignment, or in the intention of the parties, to vary the rule. *Graham* v. *Campbell*, Meigs, 52; *Roberts* v. *Francis*, 2 Heis., 133; 1 Lea, 693; 4 Bax., 418; 1 Hum., 537; 13 Lea, 353.

This rule is in accord with the great weight of authority. Among the cases above cited, to which many others might be added in affirmance of the rule as to equality of lien of note holders, we call special attention to *Parker* v. *Mercer*, 6 Howard, 320, as reported in 38 Am. Dec., 438.

To this case the editor of the American Decisions appends a most valuable and elaborate note, in which many cases are collected. The question and cases are thus stated:

"Several notes may be secured by one mortgage, or deed of trust, and, when so secured, may be assigned to different persons. The question then arising is, which note is entitled to precedence in payment out of the proceeds of the security? The answers to this question are irreconcilable, and may be arranged under three classes:

"1. Those which, like the principal case, affirm that the proceeds should be applied pro rata to the several notes, irrespective of their dates of maturity or of assignment, on the ground that each note, according to the proportion it bears to the whole debt, is secured by the whole mortgage, and continues so secured, whether assigned or not, in the absence of any stipulation to the contrary: *Keyes* v. *Wood*, 21 Vt., 331; *Pattison* v. *Hull*, 9 Cow., 747; *Phelan* v. *Olney*, 6 Cal., 478; *Donley* v. *Hays*, 17 Serg. & R., 400; *Betz* v. *Heebner*, 1 Pen. & W., 280; Hancock's Appeal, 34 Pa. St., 155; *Cooper* v. *Ullmann*, Walk. Ch., 251; *English* v. *Carey*, 25 Mich., 178; *McCurdy* v. *Clark*, 27 *Id.*, 445; *Wilcox* v. *Allen*, 36 *Id.*, 160; *Dixon* v. *Clayville*, 44 Md., 573; *Cage* v. *Iler*, 5 Smedes & M., 410; *Henderson* v. *Herrod*, 10 *Id.*, 631; *Jefferson College* v. *Prentiss*, 29 Miss., 46; *Bank of England* v. *Tarleton*, 23 *Id.*, 173; *Stevenson* v. *Black*, Sax., 338; *Page* v. *Pierce*, 26 N. H., 317; *Ewing* v. *Arthur*, 1 Hum., 536; *Andrews* v. *Hobgood*, 1 Lea, 693; *Smith* v. *Cunningham*, 2 Tenn.

Ch., 568; *Tinsley* v. *Boykin*, 46 Tex., 592; *Paris Exchange Bank* v. *Beard*, 49 *Id.*, 358.

"2. Those which affirm that, in the event of the assignment of the notes, or of any of them, the assignees take precedence over the assignor with respect to the notes retained by him, and that, as between several assignees, they are entitled to precedence in the order of their several assignments: *McClintie* v. *Wise's Administrator*, 25 Gratt., 448; *Grigsby* v. *Hair*, 25 Ala., 327; *Salzman* v. *His Creditors*, 2 Rob. La., 241; *Barkdull* v. *Hennig*, 30 La. An., 618; *Waterman* v. *Hunt*, 2 R. I., 298.

"3. Those which treat several notes secured by one mortgage as having precedence in the order in which such notes mature: *Richardson* v. *McKim*, 20 Kan., 346; *Wilson* v. *Haywood*, 6 Fla., 171; *Vansant* v. *Allmon*, 23 Ill., 30; *Funk* v. *Reynolds*, 33 *Id.*, 481; *State Bank* v. *Tweedy*, 8 Blackf., 447; *Murdock* v. *Ford*, 17 Ind., 52; *Isett* v. *Lucas*, 17 Iowa, 503; *Grapengether* v. *Fejervary*, 9 *Id.*, 163; *Mitchell* v. *Laden*, 36 Mo., 526; *Thompson* v. *Field*, 38 *Id.*, 320; *Ellis* v. *Lamme*, 42 *Id.*, 153; *Wood* v. *Trask*, 7 Wis., 566; *Marine Bank* v. *International Bank*, 9 *Id.*, 57; *Lyman* v. *Smith*, 21 *Id.*, 674.

"Of course, there may be special equities arising out of the assignments, or out of the intention of the parties as manifested therein; and when this is the case, the general rule of law will be considered inapplicable, and the special equities will be recognized and enforced. It will be seen from the

foregoing citations, that the conflict of decisions on this subject is remarkable; that the cases falling within the first and those falling within the third class, are so nearly equal that no decided preponderance appears. Those belonging to the second class are less numerous."

It will be observed that all these cases recognize the right of the vendor in the one case or mortgagee in the other, to give a priority among notes secured by liens in a vendor's deed, or in a mortgage, accordingly as he may contract, with any assignee. This doctrine is well recognized in Tennessee. Here it is also held that such an assignment is good as between the assignor and the assignee, and that it need not be in writing, as appears to be the general rule. *Hicks* v. *Smith*, 4 Lea, 459. In this connection, it is proper to say that, to the extent noted, and only to that extent, have the Tennessee cases gone. It has not been established as the law of this State, and, therefore, of course, not as a rule of property, that the transfer of a negotiable promissory note secured by mortgage, made in connection with contract giving to such assignee a prior lien, will vest in such assignee an equity superior to that of a subsequent assignee of one of said notes, who is a purchaser for value, and without notice of the former assignment and lien contract. The two cases cited in 4 Lea, and urged as holding that doctrine, were not cases of assignments to purchasers for value, but were assignments to pay

pre-existing debts. So far, therefore, the question here presented is an open one in this State.

We return now to a discussion of that question. Without regard to conflict or difference of opinion in cases cited, it appears that several questions are definitely settled, the principal one with which we are concerned being that the vendor or mortgagee may by contract, in writing or parol, assign the whole or any part of the mortgage or vendor's lien to secure any part of the notes assigned, whether they be the first or last maturing, or the intermediate notes of any series.

It has been seen, also, that without respect to the question of the effect of the assignment of a portion of one note, or of a part of a series of notes secured in a mortgage (conditions involving other and different considerations), many cases assert the proposition that an assignment when made of a single note, though negotiable and the entire debt secured, does not carry the equity of the mortgage security, so as to prevent an assertion of the equities between the original parties.

We have, however, shown that the weight of authority is, and the clear rule of reason is, that as between the original parties, the vendor and the vendee and the mortgagor and mortgagee, the assignment of such a negotiable note by vendor or mortgagee may vest in the assignee a right superior to that of the assignor, the vendor or mortgagee.

There is, however, a different condition of fact,

which requires the assertion of a different equity, between the subsequent assignee of one of a series of negotiable notes without actual notice of a prior assignment with lien of contract priority, as between the two assignees, than that which would prevail between such an assignee and the mortgagor.

It does not follow that, because the assignee of one of a series of mortgage notes, which had been transferred and delivered to him by the mortgagee, and which had been paid by the mortgagor before such transfer and delivery, takes such note freed of all equities of the mortgagor, that he would, therefore, take it free from all equities of a prior assignee of another note of the same series, which had been transferred with a preference lien contract.

In the first case, the assignee's right would undoubtedly be superior to that of the mortgagor, because, as between these parties, the note itself is a single and perfect obligation. If the mortgagor had paid it off, he should have taken it up, and not left it in the hands of the mortgagee with power to transfer to one who might be a *bona fide* purchaser before maturity upon a valuable consideration, thus enabling the mortgagee to give to such *bona fide* purchaser a perfect title secured by the mortgage, upon which the purchaser had a right to rely, without actual notice of anything to the contrary, and without any condition of facts which would put him upon inquiry and charge him with notice.

When the assignee found such note so secured

still in the hands of the mortgagee apparently unpaid, he had the right to assume that it was unpaid, and no duty devolved upon him, as between him and the payor, to make further inquiry. But such is not the rule if condition of facts requiring its application do not exist—as, between a subsequent and a prior assignee of one of a series of negotiable notes secured by the same mortgage.

If the mortgagee holding any part of said notes proposed to assign them to another assignee, and at the same time to give to such assignee a preference over the lien of all other notes to the amount of those to be assigned, the assignee has notice that the note proposed to be indorsed to him is one of a series of notes secured by the same deed; he is presumed to know the law that the mortgagee can give to another assignee priority of lien. As a matter of fact, he knows that the mortgagee either has the other notes in his own hands unassigned, or that they are out of his possession and in the hands of others claiming them with or without preference of lien. He may not know the actual fact that any such notes have been assigned, or he may not be informed of it at the time by the assignor, but the mortgage deed itself, securing a number of notes, gives him notice that all are outstanding. He is charged, therefore, with constructive notice of another prior assignment, if one has been made, for he can demand of the mortgagee the production of the other notes of the series, and, if the mortgagee cannot

produce them, he will know that they either have or may have been assigned, and, being presumed to know the law, will know that they may have been assigned under contract giving preference of lien. He is, therefore, charged with constructive notice of what, upon such investigation, he might have discovered. If, for instance, he calls upon the mortgagee to know where the other notes are, and the mortgagee produces them unassigned, he could, of course, then buy those of the series proposed to be sold to him without danger of subjecting himself to loss on account of prior equity. If the mortgagee failed to produce the other notes, but insisted that they were not transferred to others, and that no prior liens had been given, the assignee could, but only at his peril, take the notes proposed to be assigned to him. The mortgage itself was notice of the existence of the other notes, and his presumed knowledge of the law is that some of them may have been assigned with lien preferences. These conditions require him, so far as the equities between him and the prior assignees are concerned, to ascertain, before purchasing, whether any prior assignment had been made, and whether, in connection with it, a superior lien had been, by contract, given to any prior assignee. A failure to make such inquiry is at the peril of such assignee. If he purchases one or more of the series of such notes without such inquiry, and loses the benefit expected therefrom, by reason of prior assignment of lien, it is his own fault. He was not, as between himself

and a prior assignee, about whose rights the facts and the law require inquiry, a *bona fide* purchaser. *Wilson* v. *Eigenbrodt*, 30 Minn., 4; *Moore* v. *Ware*, 38 Maine, 496; *Phelan* v. *Olney*, 6 Cal., 478; *Keyes* v. *Wood*, 21 Vt., 331; *Roberts* v. *Halstead*, 9 Pa. St., 32.

Upon the theory, therefore, that the assignees of such of the one hundred and twenty-six notes as were assigned after the transfer of the thirty-two notes and prior lien to Miss Crowninshield, were not *bona fide* purchasers without notice of such assignment, we hold that her equity is superior to theirs, and she is entitled to have those notes fully paid before any portion of the proceeds of the sale is applied in satisfaction of the other notes.

The argument that this holding impairs the negotiability of paper is not well founded. The conclusion itself is based upon the fact that purchasers of such notes (parts of a series secured in a mortgage) are charged with notice that the others may have been, or may be, assigned under a special contract giving priority. Such a result may be avoided by mortgage drawn in such form as to prevent preferential assignments. Where this is not done, however, it is clear that the Courts, under the rules of law established, are compelled to give these assignments effect according to the contract and intention of the parties.

The decree of the Chancellor is, therefore, re-

versed, and decree will be entered here in accordance with this opinion. The costs of the Court below will be apportioned between the parties according to their respective interest in the notes, and the costs of this Court will be paid by the appellees.

SWEENEY *v.* VAUGHN.

(*Nashville.* March 6, 1895.)

1. SALES. *Waiver of terms.*

The condition that the purchaser's note to be given at a public sale shall bear interest from date is waived, and title vests in the purchaser, where the seller furnished the form of note to be given, omitting interest, and made no objection on account of the omission, when the note was returned properly executed in other respects in compliance with terms of sale.

2. SAME. *Requirement of approved security.*

The condition in the terms of a public sale that the purchaser shall give note "with two approved securities" is complied with, and title vests in the purchaser, when he tenders note duly executed, signed by two good and solvent sureties, which is justly entitled to approval. The seller cannot arbitrarily reject such note.

Cases cited: 2 Campbell, 530; 9 N. E. Rep., 101; 4 S. & R. (Pa.), 1.

3. BURDEN OF PROOF. *Upon purchaser to show solvency of sureties.*

The *onus* is upon the purchaser, in such case, to prove that the note tendered was such as the vendor ought to have approved and received.

Case cited: 20 Wend. (N. Y.), 431.

FROM WILLIAMSON.

Appeal in error from Circuit Court of Williamson County. W. L. GRIGSBY, J.

Sweeney *v.* Vaughn.

S. S. HOUSE for Plaintiff.

THOMAS & HOUSE for Defendant.

SNODGRASS, Ch. J. Vaughn was the purchaser of a horse at a public sale made by Sweeney in pursuance to an advertisement of sale of this and other personal property. The terms of the sale, as set forth in the advertisement, were: "All sums under ten dollars, cash; over this amount, a credit of twelve months will be given. Notes, with two approved securities, bearing interest from date," required of purchasers.

The sale was made on January 6, 1894. The horse in controversy was bought by Vaughn at the price of seventy-two dollars, an amount which required the giving of a note. Vaughn was not then prepared to execute note, but told Sweeney he would have to go to Franklin to get sureties. To this Sweeney assented, no time being specified when the note should be presented. Sweeney gave Vaughn the following note in blank to be signed: "By the twenty-fifth of December next, we, or either of us, promise to pay J. J. Sweeney seventy-two dollars, for value received of him. January 6, 1894." To this note Vaughn, after signing himself, procured the signatures of two men proven to be good and solvent, and presented it to Sweeney on the fourteenth of January. Sweeney declined to take it, saying he had decided not to let Vaughn have the horse. Thereupon, Vaughn sued out a writ of

replevin before a Justice. He obtained judgment, and defendant appealed. Tried by the Circuit Judge on this appeal, judgment was again rendered in his favor. Defendant Sweeney appealed to this Court, and assigned errors.

Several errors are assigned, only two of which need be noticed: First, that the note itself did not bear interest, in accordance with the terms of the sale. But Sweeney gave the note just as it is to Vaughn to be signed, and must be held to have waived such condition. And it appears in evidence that he did not except to the note, when presented, on this ground, and so this is not now material. Second, the notes to be taken were not "approved" in the sense of the contract, Sweeney insisting that this term meant to reserve to him the right to approve or disapprove the notes offered, however good or bad. This is not the sense in which this word, in its connection here, must be understood and construed.

There is no difficulty in a vendor contracting to sell property only on such security as he shall personally approve, if such contract is so specific as to fix the right, but a sale made on terms of acceptance of "approved" security or surety, without more, is properly held to mean good and solvent security which ought to be approved, which the vendee can show to be good and meriting approval. One of the definitions of "approve" given by Mr. Webster is, "To make or show to be worthy of

approbation or acceptance." This is the proper meaning of the word as used in this contract. *Hodgson* v. *Davis*, 2 Campbell, 530; *Andis* v. *Personett*, 9 N. E. Rep., 101; *Gnier & Diehl* v. *Page*, 4 S. & R. (Pa.), 1.

In a controversy arising under such a contract, the *onus* is on the vendee to show that the note offered was such a note as the vendor ought to have approved and received. 20 Wend. (N. Y.), 431. This he has done in this case by evidence not controverted.

The judgment must be affirmed.

*McFarland *v.* Bush.

(*Nashville.* March 7, 1895.)

1. Wills. *Subscribing witness.*

The signature of a witness who does not make any mark on the instrument, or touch the pen or guide the hand which makes the signature, although written for him at his request and in his presence, is not sufficient as that of a subscribing witness to a will of realty. (*Post, pp. 539–541.*)

Cases cited and approved: Ford *v.* Ford, 7 Hum., 96; Simmons *v.* Leonard, 91 Tenn., 183; Clark *v.* Thomas, 4 Heis., 422; Bates *v.* Taylor, 87 Tenn., 324; Porter *v*, Lee, 88 Tenn., 791.

2. Dictum. *What is not.*

Where two or more questions, each decisive in itself of the entire case, fairly arise upon the pleadings and proof, and are fully considered and deliberately passed upon, the Court's opinion is not dictum as to any of the matters determined, although the decision might have been rested upon a single point. (*Post, pp. 541, 542.*)

FROM WILLIAMSON.

Appeal in error from Circuit Court of Williamson County. W. L. Grigsby, J.

Thomas & House and John H. Henderson for McFarland.

*The sufficiency of a signature by mark is the subject of an extensive note to *Re Guilfoyle*, 22 L. R. A., 370.—Reporter.

SMITH & DICKINSON and H. P. FOWLKES for Bush.

WILKES, J. This case presents an issue of *devisavit vel non* over the will of Mrs. S. T. McFarland. There was a verdict in favor of the will in the Court below, and the contestant has appealed and assigned errors.

The only question involved is as to the attestation of the will by one of the subscribing witnesses, James R. Barnes. The will purports to convey both personalty and land. It is admitted to be good and valid as to the personalty, but it is claimed to be inoperative as to the land, because one of the subscribing witnesses, James R. Barnes, did not write his name, nor did he make his mark or touch the pen in the hands of the other subscribing witness, Battle, who signed his name for him in his presence and at his request, and in the presence and at the request of the testatrix. All other requirements as to request by the testatrix, and the other formalities necessary to make the execution of the instrument valid and perfect as a will, were complied with, the sole question being, whether the attesting witness must make a mark upon the will to answer for and stand in place of his signature, where he is unable to write or sign his name himself and requests another party to write it for him. Barnes was examined as a witness on the trial, and stated that while he could neither read writing nor write, still he could recognize his name when written, and

he did identify the paper in controversy as the paper to which he authorized his name to be subscribed. He made this identification both from the appearance of the name and the general appearance of the paper.

The Court was requested to charge the jury that if they found the paper writing in question was witnessed by one witness, Battle, subscribing his own name as a witness at the request of the testatrix, and that this witness subscribed the name of another party, Barnes, at his request and that of the testatrix, the said Barnes not touching the pen nor guiding the hand of the party signing the same, or making his mark, this would not be sufficient attestation to pass real estate, but this was refused. We think this was error.

It has been held by this Court, in *Ford* v. *Ford*, 7 Hum., 96, that a person whose name is written by another, and who makes his mark thereto, is a good attesting witness to a will. This practice, however, is not to be encouraged or extended. 1 Jarman on Wills, 213.

This case is apparently based on the idea that not only is the witness' name written by his authority, but, in addition, he takes a part in the signing, similar to that where another person guides his hand, and he thus makes his own signature through another. But we are not inclined to extend the rule any further than it has already gone, and it has been expressly held that a writing of the name

by authority is not sufficient, unless it is accompanied by some mark or sign of the person, who thus makes it his own signature. *Simmons* v. *Leonard*, 91 Tenn., 183.

It is said this decision is a dictum on this point, the argument being that there were other questions involved in it, upon which the decision could have been, and would have been, rested. Grant this to be so, it does not make the holding and opinion in that case a dictum. The question was fairly and directly involved, fully considered and deliberately passed upon. The fact that the decision may have been rested on a different ground, even though one more satisfactory, does not place the decision in the category of a dictum, if the question was fairly raised and duly considered and decided, as was the case in *Simmons* v. *Leonard*. See *Clark* v. *Thomas, Adm'r*, 4 Heis., 422; *Boles* v. *Taylor*, 3 Pick., 324, 325; *Porter* v. *Lea*, 4 Pick., 791.

Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would have disposed of the entire case on its merits without the other, and neither holding will be a dictum so long as it is properly raised and considered.

It is said that making a mark, thus (X), and touching the pen is of, practically, no importance, and does not serve to aid the witness in identifying the paper in any way. This may be so, and it would be an argument against allowing marksmen to

be attesting witnesses at all, but this is not the question before us, that having been decided in *Ford* v. *Ford*, and recognized in *Simmons* v. *Leonard*. But the witness must make some kind of mark upon the instrument in order to make it his signature and in place of his signature.

The judgment must be reversed and remanded, and the costs will be paid out of the estate.

RATHER *v.* WILLIAMS.

(*Nashville.* March 8, 1895.)

CHANCERY PRACTICE. *Rule 2, Section 4, construed.*

Chancery Rule 2, Section 4, providing that "after a cause is set for hearing, the same shall be open to both parties for proof without leave of the Court, and without remanding the cause to the rules, but each party must take his proof in chief within four months and the rebutting proof within two months," has not the effect to postpone absolutely the hearing of a Chancery cause for the full term of six months after the issues are made up. The Chancellor's action is sustained in disposing of this cause, upon regular call of his docket, over defendant's objection showing no merit, within four months after the cause was first open for proof, it appearing that no proof in chief or rebuttal was essential, or could be material, to either party upon the issues presented, and that complainant had notified defendant that his proof in chief was closed more than two months before the hearing.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. J. C. BRADFORD, Sp. Ch.

CHAMPION, HEAD & BROWN and PALMER & RIDLEY for Rather.

STEGER, WASHINGTON & JACKSON for Williams.

McALISTER, J. The solution of the question presented in this record depends upon a proper construction of Rule 2, Section 4, of Chancery Practice, which is as follows: "After a cause is set for hearing, the same shall be open to both parties for proof without leave of the Court, and without remanding the cause to the rules, but each party must take his proof in chief within four months and the rebutting proof within two months; *Provided*, The Chancellor or Master may extend the time, upon sufficient cause shown by affidavit, upon terms."

The question for determination arises out of the following state of facts: On March 20, 1894, complainant filed this bill against the defendants, Williams and Yarbrough, Maddux & Davis, to collect a note executed by them for the sum of $5,000, and to subject to sale certain collateral securities hypothecated for its payment. On April 5, 1894, Williams filed an answer, in which the execution and delivery of the note were not denied, but it simply averred "that defendant does not admit that the note sued upon is the property of complainant, and does not admit that complainant is entitled to maintain suit upon it. Defendant denies that he is indebted to complainant as charged, and denies the right of complainant to sell, or cause to be sold, the stock mentioned in the bill; and defendant denies complainant's right to judgment against him." On April 6, 1894, *pro confesso* was taken against

the other defendants. On May 2, 1894, the deposition of the complainant was taken and filed, exhibiting the note and proving the allegations of the bill. And thereupon defendant was notified that complainant had finished his proof, and was ready for trial.

The defendant made no proof, and, on July 10, two months and eight days after said notice, the cause was regularly reached and called for trial. The defendant resisted the hearing of the cause upon the ground that the six months allowed by Rule 2, Sec. 4, of Chancery Practice had not expired. The defendant did not, by affidavit or by suggestion of counsel, claim that he had any testimony he desired to offer, but based his resistance exclusively upon the technical ground that he was entitled to six months, under the rule, to take his testimony. The Chancellor was of opinion that defendant was not entitled to any further time, and, accordingly, pronounced a decree in favor of complainant for the amount of the note with interest, and, upon default in the payment of the decree within sixty days, he ordered a sale of the collaterals for its satisfaction. Defendants appealed, and the only error assigned is, that, after the expiration of the four months allowed for taking testimony in chief, the defendant was entitled to two months to take rebutting testimony.

We think the decree was correct. There was no defense relied on in the answer that required any

testimony in chief, and the defendant had over two months for taking his rebutting testimony. "Proof in chief, in the meaning of the Chancery rule, is proof that tends to establish the affirmative allegations of the pleadings, and rebutting proof is proof that tends to refute these allegations, or that assails the evidence or witnesses of the other party. Proof of matters in avoidance is proof in chief." Gibson's Suits in Chancery, Sec. 463.

As already observed, defendant did not deny the execution and delivery of the note, or plead any matter in avoidance, or rely upon any defense by affirmative allegations. The general averments of the answer amounted to no defense and called for no testimony in chief. Moreover, the defendant was notified on May 2 that complainant had closed his testimony, and, from that date, more than two months elapsed before the cause was called for trial, during which time defendant offered no testimony in rebuttal.

On the application for a continuance, defendant made no showing or suggestion of any facts he wished to prove, nor designated any witnesses he desired to examine. The defendant was not entitled, under the rule, as a matter of right, to any additional time, and he made no showing upon his application for a continuance that appealed to the discretion of the Chancellor to grant him further extension.

There is no error in the decree, and it is affirmed.

WILSON *v.* MORRIS.

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(*Nashville.* March 15, 1895.)

1. WILL. *Widow entitled to exempt articles.*

The widow is entitled to all articles exempt to her by statute, under the husband's will providing that after his personal estate is "settled up and closed," the proceeds or residue shall be divided between his widow and only child "as the laws of the State of Tennessee direct." (*Post, pp. 548–560.*)

Cases cited and approved: Alexander *v.* Wallace, 8 Lea, 569; 25 Beavan, 163; 23 Beavan, 436; L. R., 20 Eq., 410; 39 Mich., 464 (S. C., 33 Am. Rep., 418); 5 N. J. Eq., 349; 24 Pa. St., 394.

2. SAME. *Widow entitled to year's support.*

And the widow is entitled to year's support under the provisions of such will of the husband. (*Post, pp. 548–560.*)

3. SAME. *Widow entitled to half of residue.*

And the widow is entitled to one half of the residue of the personal estate, after deducting debts, funeral expenses, and special legacies directed to be paid out of the personalty, under the provisions of such will of the husband. (*Post, pp. 548–560.*)

4. SAME. *Widow entitled to half of any residue of special legacy.*

And the widow is entitled to one half of what may remain at the beneficiary's death of a specific sum set apart by such will of the husband to be used so far as necessary for the support of his imbecile sister. (*Post, pp. 548–560.*)

5. SAME. *Widow entitled to homestead.*

And the widow is entitled to homestead, as well as dower, out of the husband's real estate, notwithstanding such will may further provide that his real estate should be retained by the family, and that his widow should be entitled to dower out of same, without mentioning homestead. (*Post, pp. 560, 561.*)

Case cited and approved: Jarman *v.* Jarman, 4 Lea, 671.

Wilson *v.* Morris.

6. CHANCERY PLEADING AND PRACTICE.

A personal representative is not entitled to decree, without proof, upon his averment in the bill, which is denied by the answer, that he had returned full inventories of the estate. (*Post, p. 561.*)

Case cited and approved: Bank *v.* Jefferson, 92 Tenn., 537.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. ANDREW ALLISON, Ch.

STEGER, WASHINGTON & JACKSON for Wilson.

SMITH & DICKINSON for Morris.

BEARD, J. Robert C. Morris died in 1892, after having made a last will and testament, in which complainant was named as executor. The testator left surviving him a widow, the defendant, Kate Morris, and an only child, the wife of complainant, who are the principal beneficiaries of this will. A difference having arisen between them as to their respective interests under the will, this bill was filed by the executor for its construction.

While the sixth clause and a part of the seventh clause have produced this controversy, yet it is proper, in order to understand the conclusions reached by us, to give a synopsis of the other clauses of the will. By the first, the testator directs all his debts, and

his funeral expenses, to be paid as soon as can be done conveniently after his death; by the second, he sets apart, in the hands of his executor, a fund of $5,000, to be used by him for the support of an imbecile sister of the testator, Mary Ann Morris, as far as may be necessary during her life, and by the third, fourth, and fifth clauses he gives moneyed legacies to different parties. The sixth clause is as follows: "It is my desire and request, that my personal estate be settled up and closed with as much dispatch as is convenient after my decease, and that the proceeds of the same be divided between my beloved wife, and daughter, Sallie Wilson, my only child, as the laws of the State of Tennessee direct." The seventh clause, as far as it is necessary to give it here, is as follows: "My real estate, situated in Hamilton County, Tenn., near the city of Chattanooga, is increasing in value, and I advise that it be retained by the family. My wife will be entitled to a portion of this tract of land as dower during her life."

Upon this will, it is now insisted by the executor, that it is his duty to pay the debts of the estate and the legacies, and set apart the $5,000 for the benefit of the imbecile sister referred to, and when this has been done, then, under the sixth clause, he is to divide whatever surplus there may remain of the personal estate, equally between the widow and the daughter of the testator, and that this share of the widow in this surplus is the full measure of her

interest in the personal estate. It is also insisted by him that, while the widow can claim dower out of the realty, she is not entitled, under the will, to a homestead. On the other hand, the contention of the widow is, that upon a proper construction of the will, she is entitled, out of the personal estate, as follows: First, to the articles exempt to a widow under the statute; second, to a year's allowance; third, to one half of what may be left after debts, special legacies, and the $5,000 fund for the benefit of Mary Ann Morris have been provided for; fourth, to one half of any surplus left of this $5,000 at the death of the beneficiary; and out of the real estate, to homestead as well as dower.

The question, then, first for consideration is: What interest does the widow take, under the will, in the testator's personal estate? To answer this, it is necessary to ascertain the intention of the testator in directing, as he does in the sixth clause, a division of the proceeds of his personal estate between his wife and daughter "as the laws of the State of Tennessee direct."

That his wife was an object of the testator's affectionate care and bounty is evident from the will, and it is apparent that he does not cut her off from the articles exempted by statute to widows, and from the year's allowance, by the use of inhibitory words. It is true that, under § 3125 of the (M. & V.) Code, only widows whose husbands die intestate, or widows who dissent from the wills of their deceased

husbands, are entitled to this allowance, and, as Mrs. Morris is in neither of these classes, she would not be entitled to the benefit of this statute, unless the will of the testator gives it to her expressly, or by words of necessary implication. It is incumbent on her to show that the testator intended that she should take this allowance as she would have done had he died intestate.

An examination of 2 Jarman on Wills, 674 *et seq.* (Randolph & Talcott's Ed.), discloses that wills containing clauses like the one in question, that is, referring the distribution of testators' estates "to the statute of distributions," or "to the law as it directs," have been fruitful sources of litigation. As was said by the Master of Rolls in *Starr* v. *Newberry*, 23 Beavan, 436, "all such wills have peculiarities and inconsistencies which, if pointed out to the testator, would have been avoided." In each case, however, it has been the purpose of the Court to ascertain from the will itself the intention of the testator, and then to give the instrument that construction which will, if possible, effectuate that intention, if it be a legal one.

It is to be observed that the testator in the will before us, in this sixth clause, after directing that his personal estate shall be settled up and closed with as much dispatch as is convenient, then provides that its proceeds be divided "between his beloved wife and daughter"—not equally, nor in any other fixed proportions, but as "the laws of the

State of Tennessee direct." In other words, this clause seems to indicate that the testator was satisfied that the general laws of the State, with regard to the distribution of the personalty of one dying intestate, leaving a widow and child, were wise and just, and he therefore referred the disposition of his personal estate to those laws, in so far, at least, as their application may be consistent with his provision for special objects of his bounty that these general laws would not recognize. Evidently he does not intend to, nor does he, die intestate as to so much of his personal estate as his widow and child are to take, but, after distinctly naming them as the objects of his love and care, instead of making an arbitrary division between them, is content, so far as they are concerned, that the laws, as in the case of intestacy, should direct the division. While naming the wife and child as among his preferred legatees, he leaves it to these general laws to fix the measure of their respective interests.

Holloway v. *Radcliffe*, 25 Beavan, 163, is a leading and instructive case on this point. The will in that case gave the property to the widow for life, and, after death, to the testator's son, if any son was then living, but, if this son died during the life of the widow, then the executors were directed to convert the property into money, and, after payment of all expenses incident to such conversion, then, as to this balance, the testator uses these words: "One moiety, or equal half part thereof, I

give unto and equally amongst my legal representatives, in such and the like manner as if the same had been to be paid under the statute of distributions." The son died in the lifetime of the mother, and then the latter died. The contingency having occurred upon which this clause was to take effect, a bill was filed for its construction. It will be seen that the difficulty was increased by the use of the words "equally amongst," inasmuch as the statute of distribution did not provide for equality amongst those who were determined by the Court to be the beneficiaries of this bequest. The Master of the Rolls, Sir John Romilly, after showing that the words "legal personal representatives" were flexible in their nature, and were not used in this will in the technical sense, says: "By referring to the statute to point out the persons who are to take, the testator has expressed that those are to take whom the statute of distribution designates, certain persons who are living at the death of the testator. * * * The words, therefore, designated the next of kin of the testator who survived him, according to the statute of distributions." His widow and his son were his next of kin at the time of his death, in view of the above holding, and, if the distribution was made according to the statute, then the widow was entitled to one third and the son to two thirds of this one half or moiety.

But it was insisted for the widow's representatives that this division was in violation of the terms

of the legacy, which provided that it should be divided "equally amongst" the testator's next of kin, and that this would give to the widow one half, instead of one third, of this moiety. To this, however, the Master of the Rolls replied it was true "the testator gave this moiety equally between the persons so ascertained; still, the statute of distributions is referred to not only for the purpose of pointing out who are the persons to take, but also the further purpose of pointing out the manner in which they are to take; that is, the will directs that the persons pointed out by the statute are to take this moiety in the like manner prescribed by the statute." It was accordingly held that this moiety passed one third to the widow and two thirds to the son.

Again, in *Starr* v. *Newberry*, *supra*, a testator gave the residue of his personal estate to his executors, to pay the interest to his wife "during the time of her natural life, or until she should marry again, in either of which events, to his child, if any, absolutely;" but, should his wife die or marry again without leaving a child, or should such child die before attaining the age of twenty-one years, then the trustees were directed to pay such moneys to "such person or persons as might be legally entitled to the same under the statute of distributions." A child was born after testator's death, and died while an infant, and the widow married again, and, in a controversy over the construction of the will,

it was held that the persons who took under this clause were the next of kin at the testator's death, and that the will, by its reference to the statute of distributions, contained a clear and distinct expression that, in the event stated, the testator's estate was to go as if he had died intestate.

In *Fielder* v. *Ashworth*, L. R., 20 Eq., 410, the words of the will were: "To distribute the residue to my relatives, share and share alike as the law may direct." In construing these words, the Vice Chancellor said: "I think the intention of the testator was that, not having made up his mind how to divide his property, and probably not knowing how it would go under the statute of distributions, he thought it better to leave it entirely to the law, having confidence that it would then be divided in the most proper manner. The only mode of effecting this object is to disregard the words 'share and share alike,' and order the property to be divided as the law directs; that is, according to the statutes of distribution."

The case of *Alexander* v. *Wallace*, 8 Lea, 569, is an instructive one. There the testator, in prior clauses of his will, having provided for the payment of his debts and certain legacies, proceeds: "I direct that the remainder of my estate, both real and personal, be divided among my heirs according to the laws of the State of Tennessee now in force, none preferred, none discriminated against." The Court say that the obvious intention of the

testator, in the clause in the will now before us, was to refer to the laws of the State of Tennessee now in force, not only for the purpose of pointing out the persons who were to take, but also for the purpose of pointing out the manner in which they are to take. The result was, the Court held that the proper construction of this clause was that the issue of the testator's deceased brothers and sisters would take the real estate under the statutes of descent, "such issue in each descending line taking by way of representation of the deceased parent, and therefore, *per stirpes*, without any limit to the representation," and that the children of the deceased brothers and sisters, to the exclusion of the remoter descendants, would take the personalty; and this was the result, notwithstanding the use by the testator of the words "none preferred, none discriminated against." In the opinion in this case, the Court refers approvingly to, and quotes from, the case of *Fielder* v. *Ashworth*, *supra*, and *Holloway* v. *Radcliffe*, *supra*.

Not only is this the rule of construction adopted by the Courts when the testator refers to the statute of distribution to determine the measure or quantity of his bounty, but, where the rights of the wife are involved, and a construction can be adopted consistent with the general intent discerned in the will, and favorable to those rights, the Courts lean to such construction. As, in *Riley* v. *Reynolds*, 39 Mich., 464 (33 Am. Rep., 418), the testator, in

his will, said, first, "to my wife, the provision made for her by the statutes of this State I deem sufficient;" and, after giving sundry legacies, concluded by giving to his son all the residue of his estate left after paying these legacies, etc. It was insisted that the first clause gave nothing to the widow; it was not a legacy; and, as the son took all after paying legacies, nothing could be deducted as a statutory allowance to the widow. The Court, speaking through Judge Cooley, said they were "unwilling to find in the will any such meaning when a construction consistent with a proper feeling is at least equally natural and reasonable." Concluding "that the construction most favorable to the widow should be preferred," the Court held that the wife took such a share as if the testator had died intestate.

In *Adamson* v. *Ayres*, 5 N. J. Eq., 349, the testator provided that his wife should have her lawful right of dower out of his estate, and it was held that, under these terms, she was not merely entitled to dower in land, but to her statutory third of his personal property. The Court said: "Estate includes both real and personal property. We are asked to substitute the word 'lands' for 'estate.' This would certainly relieve the will of all difficulty of construction, but it would leave the clause useless, and it would leave no object or motive in the testator for introducing it but that of putting in the face of his will a clear intention of cutting off his wife from all interest in his personal estate."

In Stineman's appeal, 34 Pa. St., 394, in a will somewhat similar to the one at bar, the Court held that the intestate laws of the State were to be looked to for the measure of the widow's claim, and that construction was adopted which gave her the largest right under the laws.

But it is insisted in the argument for the executor that the words "settled up and closed," in the early part of this clause, necessarily limit the meaning of the later words, "as the laws of Tennessee direct," and that the testator meant to say that, after all the debts and obligations had been paid, then the remainder should be divided between the wife and daughter, under Subsection 1, § 3278, of the M. & V. Code. If the words of that clause were taken literally, then we would have a clause where the testator, notwithstanding the fact that he had clearly indicated in the other clauses of his will other objects of his bounty, yet, by this clause defeated these objects; for, in this clause, he directs, not the remainder of his personal estate that is left after the settlement of his debts and the payment of the other legacies "to be settled and closed up," but his "personal estate" as a whole, and its proceeds divided between his wife and daughter. But this, however, would be to stick in the bark, and adopt a construction the result of which would be to defeat the clear intent of the testator.

It is equally apparent to us that the argument of counsel for the executor places an unwarranted

stress on the words "settling up and closing," as its effect is to make useless the words "as the laws of Tennessee direct." If the view of the executor is correct, then it was only necessary for the testator to have directed a division of his personal estate, and the provision of the Code above referred to, without more, would have supplemented the cause and worked the result the executor now insists upon. But as this view deprives the clause, "as the laws of the State of Tennessee direct," of all force, the Court should adopt a consistent construction, if such can be found, that will give it some efficiency. In the words of the Court in *Adamson* v. *Ayres*, *supra*, "we ought rather to suppose it was intended for a purpose, and that a beneficial one to the widow."

Again, if the testator had intended to cut off his wife from all the benefit that the general laws would give to her as his widow, and direct an equal division of his personal estate between his daughter and widow, the simplest way to have provided for this would have been for him to say in his will that, after paying the debts, legacies, etc., the proceeds of his personal estate should be divided equally between the two. This, or some equivalent phrase, would have avoided all confusion, and should have fixed his intention beyond debate. Using, however, the phraseology in question, it seems difficult to resist the conclusion that it was adopted with an understanding of its import, and the purpose of giving his wife the benefit of the best the law could do

for her, consistent with the other provisions of the will.

In addition, it will be noticed that the testator in this clause uses the plural noun "laws"—the division of the personal estate to be made "as the laws of Tennessee direct." By the use of this word he indicates that the division between the "wife and daughter" is to be made with regard, not to one law, but to all the subsisting laws of the State regulating the division of such an estate between a widow and her child or children whenever intestacy has occurred, subject alone to the condition indicated in the conclusion of the last paragraph above.

The result is, that we hold that Mrs. Morris is, first, entitled to have set apart to her the articles of personal property exempted under the statute. Second, a year's allowance out of the personal estate. Third, to one half of what may remain unexhausted of the fund set apart for the support of Mary Ann Morris at the death of the beneficiary; and, fourth, to one half of the proceeds of the personal estate, after the $5,000 above referred to is set apart and the moneyed legacies are paid. The Chancellor's decree holding otherwise is reversed.

As to the realty, the Chancellor allowed the widow dower, but declined to give her homestead. Without extending this discussion, it is sufficient to say, that we find that she was entitled to homestead as well as dower, and in so far as the Chan-

cellor held otherwise his decree is reversed. *Jarman* v. *Jarman*, 4 Lea, 671.

In the bill the executor alleges that he has made perfect inventories of the personal estate. This allegation is denied in the answer. In this condition of the record, and without any proof on this issue, the Chancellor held with complainant. This was error. *Bank* v. *Jefferson*, 8 Pickle, 537.

The cause will be remanded to the Chancery Court for the purpose of carrying out the directions of the decree, to be entered in accordance with this opinion.

The costs of this Court, and the Court below, will be paid out of the funds of the estate.

PHILLIPS *v.* KIMMONS.

(*Nashville.* March 16, 1895.)

1. PAROL SALES OF LAND. *Voidable, not void.*

Doctrine reaffirmed that parol sales of land are not void, but only voidable, at the election of either party. (*Post*, pp. 565, 566.)

Case cited and approved: Brakefield v. Anderson, 87 Tenn., 209.

2. SAME. *Not voidable by vendee's administrator.*

The vendee's administrator cannot rescind his intestate's parol sale of land and recover back purchase money paid thereon, when the vendor and the vendee's heirs are willing to complete the contract and tender performance. (*Post*, pp. 566–568.)

Case cited and distinguished: Masson v. Swan, 6 Heis., 450.

3. SAME. *Vendor may enforce payment of purchase money.*

The vendor may, in such case, enforce sale of the land for balance due on the purchase price. (*Post*, pp. 564, 565, 568.)

4. SAME. *Vendee's widow takes dower in surplus.*

And the vendee's widow takes dower in the surplus of the fund realized at such sale, after paying balance on purchase price and costs. (*Post*, p. 568.)

FROM BEDFORD.

Appeal from Chancery Court of Bedford County. WALTER S. BEARDEN, Ch.

IVIE & IVIE for Phillips.

Phillips *v.* Kimmons.

EDMOND and E. B. COOPER for Kimmons.

WILKES, J. Blanche Kimmons, now wife of John D. Kimmons, on April 28, 1891, before her marriage, sold to her brother, John W. Phillips, an undivided one third interest in a tract of one hundred and eighteen acres of land in Rutherford County, for the price of $1,500. Of this amount, $500 was paid September 1, 1891, and is treated as a cash payment, and the remainder was to be paid in two installments, of $500 each, on December 25, 1892, and December 25, 1893. Afterwards, and on February 1, 1892, the purchaser, John W. Phillips, made an additional payment to his sister, Mrs. Kimmons, of $275, in a paid up certificate, No. 3849, of stock in the Globe Building & Loan Association of Louisville, Ky., which was issued in the name of Mrs. Kimmons, but not actually delivered to her, but upon it she drew a dividend of $7.40 July 8, 1893.

On October 30, 1893, John W. Phillips died intestate, and his widow, Eulah Phillips, administered upon his estate. He left no children, and Mrs. Kimmons and Jesse Phillips are his only heirs at law. The sale by Mrs. Kimmons to her brother, John W. Phillips, was by parol. No deed or other assurance of title in writing was executed, and no notes were given for the deferred payments.

So soon as she was appointed administratrix, Mrs. Eulah Phillips, as administratrix, filed her bill to rescind the purchase made by her husband, and to

recover back the purchase money and interest, upon the ground that the purchase was in parol, and either void or voidable under the statute of frauds, and, in either event, she had a right, as administratrix of the vendee, to disaffirm it, and recover so much of the consideration as had been paid. She also prayed to have the building and loan association stock delivered to her, as part repayment of the purchase money. This bill was demurred to on the ground that the purchase was not void, but only voidable; that the vendors were willing to transfer, and the vendee, in such case, could not rescind, if alive; that the administratrix of the vendee had no right or option to rescind in any event, and that Jesse Phillips, one of the heirs of John W. Phillips, was not made a party.

This demurrer was overruled with leave to set up the same defenses in the answer, which was done, and Kimmons and wife, in their answer, expressed their willingness to complete the contract and carry out the sale, and tendered with it a properly certified deed.

On October 8, 1894, Kimmons and wife and Jesse Phillips filed their cross bill against Eulah Phillips, widow and administratrix of John W. Phillips, setting out that they were the only heirs of John W. Phillips, and asking that the purchase be carried out and that the deed tendered be confirmed and accepted, and the land sold to John W. Phillips be resold to pay the unpaid purchase money, and, out

of the surplus, that the widow of John W. Phillips be endowed. To this bill Eulah Phillips filed demurrer, which was overruled, with leave to rely on the same defenses in her answer, and, on October 10, 1894, she filed her answer. Proof was taken, and the Chancellor decreed that the contract, being in parol, was voidable, and that the administratrix had the right to avoid it after the death of her intestate and to recover back the purchase money paid, amounting to $775, and declared a lien upon the Kimmons interest in the land for the same, but declined to give any personal decree against Kimmons and wife for the purchase money, and directed the building and loan stock to be treated as a payment to Mrs. Kimmons and to be delivered to her. By permission of the Court below, both parties appealed and have assigned errors.

For complainants, Kimmons and wife, it is insisted the Chancellor erred in allowing the administratrix of John W. Phillips, the vendee, to disaffirm the parol contract of purchase made by her intestate and recover back the purchase money paid thereunder, and in refusing to give the relief prayed for in the cross bill.

For Mrs. Phillips, Administratrix, it is insisted that she had the right to retain the stock in the building and loan association as a part of the purchase money not actually paid over.

After some fluctuation and want of uniformity in our decisions, this Court has finally settled the doc-

trine that a parol sale of land is not void, but only voidable, at the election of either party. *Brakefield v. Anderson*, 87 Tenn., 209.

But none of our cases have, as yet, gone to the extent of holding that the administratrix of the vendee, who manifested no desire to rescind such sale in his lifetime, can, after his death, elect to disaffirm and rescind such sale.

In the case of *Mason* v. *Swan, Adm'r, et al.*, 6 Heis., 450, the vendor had died and the vendee sued the personal representative of the vendor, and his heirs, to rescind the parol sale of land and recover for improvements put on the lot, he not having paid any of the purchase money, nor tendered it. It was held that the vendee was entitled to rescind and to have pay for his improvements. The vendor had not elected to rescind in his lifetime, and the vendee made his election after the vendor's death, and was held entitled to rescind and recover. The right to recover purchase money in such case, if any had been paid, was evidently the same as the right to recover for improvements. In the case at bar we have the administratrix of the vendee seeking to rescind and recover the consideration over the protest of the vendor and the heirs of the vendee, all of whom desire to complete the contract.

The argument in this case is that, as between Mrs. Kimmons and John W. Phillips, the sale was valid, as neither had desired to disaffirm it before the death of Phillips, and upon the death of Phillips, an in-

terest to the extent of the purchase money paid vested in his heirs, Mrs. Kimmons and Jesse Phillips, subject to the balance of the purchase money, and to the dower right of the widow of the vendee in the surplus, if any, and, as a result of this contention, it is insisted that the vendor, Mrs. Kimmons, with her husband, has a right to sell the land for the unpaid purchase money due her, treating the $275 stock as a payment, and, that after this unpaid purchase money is satisfied, Mrs. Phillips, the widow of the vendee, is entitled to dower in the surplus proceeds of sale. But no personal judgment is sought against the estate of John W. Phillips for the balance of unpaid purchase money.

We are of opinion that the option to rescind a parol contract for the sale and purchase of real estate does not extend to the administrator of the vendor or vendee in case of the death of the intestate of such administrator, and especially is this the case when the vendor and the heirs of the vendee do not desire a rescission, but prefer to consummate and complete it; and *a fortiori* is this so when the vendor is willing to look to the land alone for the unpaid purchase money, and waives any right to recover against the personal estate of the vendee, as in this case. This is not in conflict with the case of *Masson* v. *Swan, Adm'r*, 6 Heis., 450, as in that case the vendee exercised the option to rescind against the administrator and heirs of the vendor.

We are therefore of opinion there is error in the decree of the Chancellor, and it is reversed, and the cause is remanded to the Court below, to the end that the land bargained to the intestate may be sold for the unpaid purchase money, treating the $500 cash and the $275 of building and loan company stock as payments at the dates when the cash was paid and the investment made in the stock. After paying this unpaid purchase money and the costs of this cause in this Court and the Court below, the widow, Eulah Phillips, will be endowed out of any surplus that may remain. The costs of the cause in this Court and the Court below will be paid out of the proceeds of sale of the land when made.

BYRN *v.* BLACKMAN.

(*Nashville.* March 16, 1895.)

GARNISHMENT. *How effected.*

Garnishment of the effects, other than money dues, of a debtor cannot be effected by taking personal money judgment against the garnishee having possession of the property for the plaintiff's debt. Such judgment is void as against creditors who, by subsequent valid proceedings, successfully impound the debtor's effects in the hands of the garnishee.

Code construed: §§ 3803, 3805 (M. & V.); §§ 3090, 3092 (T. & S.).

Case cited and approved: Barrett *v.* Thomas, Thompson's Cases, 67.

FROM RUTHERFORD.

Appeal in error from Circuit Court of Rutherford County. ROBERT CANTRELL, J.

McLEMORE & RICHARDSON for Byrn.

P. P. MASON for Blackman.

McALISTER, J. This cause involves the validity of certain garnishment proceedings. Plaintiff claims he is entitled to payment in full of his debt out of a note belonging to his judgment debtor. The determination of this question depends upon the inquiry whether or not the note in controversy had

already been impounded by other judgment creditors of the common debtor.

One A. J. Blackman was the common debtor, and these several judgment creditors sought by garnishment to subject to the payment of their judgments a certain note for the sum of $200, which Puckett and DeJarnette owed Blackman. It appears that Blackman had placed this note, for collection, in the hands of one D. J. Jackson, a Deputy Sheriff. Neilson & Sanders, on January 5, 1894, recovered a judgment before one Henry, a Justice of the Peace, against A. J. Blackman for the sum of $15.98. Execution issued, and was returned *nulla bona.* Thereupon, a garnishment notice was served upon Jackson, who answered, under oath, in writing, that he had in his hands, for collection, a note for $200, belonging to Blackman, and that it was due and unpaid, and had not been transferred. Whereupon, the Justice rendered the following judgment: "In this cause, the defendant, Jackson, answered that he had in his hands, for collection, one note belonging to A. J. Blackman for $200, given by W. E. Puckett, with R. D. DeJarnett as surety. I therefore give judgment for plaintiffs, Neilson & Sanders, and against the defendant, Jackson, for $80.71, subject to the payment of said note as above described, and for the costs of this suit, for which execution may issue. This January 22, 1894."

It further appears that, on January 18, 1894, the firm of Leach & Woods had also obtained a

judgment against Blackman, before the same Justice, for the sum of $64. Execution was returned *nulla bona*, and garnishment notice was served upon Jackson, who answered as in the last case. The Justice pronounced a similar judgment against the garnishee, with this addition, namely: "Subject to the payment of the above described note, and also first to the payment of judgment of Neilson & Saunders, this day rendered by me, they having prior claims. This January 22, 1894."

The plaintiff in the present action, C. H. Byrn, recovered a judgment against Blackman, before the same Justice, on January 22, 1894, for the sum of $165.30.

The note which Jackson held in favor of Blackman against Puckett and DeJarnett was reduced to judgment on January 25, 1894. The judgment of the Justice of the Peace was, viz.: "In this case I give judgment in favor of plaintiff, Blackman, against defendant, Puckett, principal, and DeJarnett, surety, for $226.60 and costs of suit, for which execution may issue; * * * but a portion, if not all, of said debt is captured by garnishment, etc., while in the hands of officer Jackson. This January 25, 1894."

The plaintiff, Byrn, who recovered his judgment on January 22, did not proceed by garnishment against Jackson, who held the note for collection, but against the payors of the note, the said Puckett, and DeJarnett. The garnishment notice required

Puckett and DeJarnett to appear and answer respecting their indebtedness to Blackman on January 27, 1894. The garnishees answered that they had executed the note for $200 to A. J. Blackman; that they had been sued on the note, and that, on January 25, judgment had been rendered against them by the Justice for the sum of $226.60. They filed with their answer the note and warrant and entry of judgment, and answer that the judgment is unpaid, and that when the garnishment was served on them they had no notice of any transfer or attempted transfer of the judgment, and that they therefore owed the said $226.60 to Blackman. They state, however, in their said answer, that when Jackson, the Deputy Sheriff, "served the warrant against us in the Blackman suit, he said he had some garnishment on the matter, but he did not show us any garnishment, nor leave any notice of the same with us." The answer was reduced to writing, signed, and sworn. Upon this answer the Justice of the Peace rendered the following judgment, viz.: "In answer to the garnishee notice, the said Puckett and DeJarnett appeared and answered that they were indebted to A. J. Blackman by note of $200, and described a specific note, and that said note was put into judgment, and that they owe said judgment so rendered of $226 on the twenty-fifth of January, 1894, by M. M. Henry, Justice of the Peace. I now give judgment against the defendants, Puckett and DeJarnett, for $80.03, the same to be paid by

them to C. H. Byrn, and credited on original judgment against them, it being for the balance of said judgment of $226 as rendered on above described note, I taking judicial notice of the fact that, on January 22, 1894, two judgments were rendered by me against D. J. Jackson, garnishee—one in favor of Neilson & Saunders for $80.71; the other in favor of Leach & Woods for $65.86—the said Jackson having in his hands said note for collection, and said note has since gone into judgment, etc., against the said defendants, Puckett and DeJarnett. I now give above judgment in this case, believing that the said amount of judgments mentioned as against said D. J. Jackson impounded that much of said judgment rendered in favor of A. J. Blackman. This twenty-first of February, 1894."

From this judgment plaintiff, Byrn, appealed to the Circuit Court, where the cause was tried by the Court without a jury and the judgment of the Justice was affirmed. The Court adjudged that plaintiff was only entitled to impound $80.96 of the $226 judgment, holding that previous garnishment proceedings in favor of Neilson & Saunders and Leach & Woods had already reached and subjected the sum of $145 on said judgment. Plaintiff, Byrn, appealed and has assigned errors.

The principal assignment relied on in this Court is that the Circuit Judge erred in not rendering judgment in favor of Byrn against Pucket, and De-

Jarnett, garnishees, for the whole amount of plaintiff's judgment against Blackman.

It is insisted that the personal judgments against Jackson are void. The insistence is that whenever a garnishment proceeding discovers personal property other than a mere debt in the hands of the garnishee, the judgment should be that it be delivered up to be subjected to the satisfaction of original judgment. It is, of course, admitted that if the garnishee answer that he owes a debt to the judgment debtor, then, of course, a personal judgment may be rendered against the garnishee, but if he answers that he has a horse or bacon, or other article of personalty, in his hands, then it is insisted that no personal judgment can be rendered against the garnishee.

Section 3803 (M. & V.) Code provides, viz.: "All property, debts, and effects of the defendant in the possession of the garnishee, or under his control, shall be liable to satisfy the plaintiff's judgment," etc., etc.

Section 3805: "If, upon the examination of the garnishee, it appears that he has property, debts, or effects in his hands or under his control liable for the plaintiff's debt, judgment may be entered and execution awarded for the property, money, or effects, as the case may be, or so much thereof as will be sufficient to satisfy the plaintiff's debt and costs," etc.

If the garnishee owes the judgment debtor a debt, then, under the provision of the Code, a personal

judgment may be rendered against him, but where it is shown the garnishee is simply in possession of property or effects belonging to the judgment debtor, judgment may be rendered and execution awarded for the property, money, or effects, as the case may be, or so much thereof as may be sufficient to satisfy the plaintiff's debt, etc.

In the case of *Barrett* v. *Thomas*, Thompson's Tennessee Cases, p. 67: "A garnishee answered before a Justice of the Peace that he had three hundred pounds of pork in his hands belonging to the defendant, whereupon the Justice rendered judgment against the defendant for the value of the pork. The garnishee did not appeal from this judgment within the time prescribed by law, but brought the case into the Circuit Court by *certiorari*, where the judgment of the Justice was quashed."

Judge McKinney said: "The judgment of the Justice of the Peace is void, and not merely erroneous. The Justice had no power to render a judgment for money. It should have ordered the pork to be delivered up for sale."

The only instance in which a personal judgment may be rendered against the garnishee is when he refuses to deliver up the property. This contingency is expressly provided for by § 3807 (M. & V.) Code, viz.: "So soon as the property is declared to be the property of the defendant, * * * it shall be delivered up to the officer serving the garnishment, on demand, and on failure to deliver the same, and

return made on the execution of that, judgment shall be entered immediately against the garnishee for the debt and costs." It is not claimed that any of the conditions prescribed by the last section, in order to warrant a personal judgment against the garnishee, appear in this record. There was no demand made for the note by the officer serving the garnishment, nor refusal by the garnishee to surrender it, nor an indorsement of that fact upon the execution, as required by the Act. It follows that, in the opinion of the Court, the personal judgment against Jackson, based upon the garnishment proceedings against him, was void, and interposed no obstacle in the way of a recovery by Byrn of the full amount of his judgment upon the garnishment answer of Puckett and DeJarnett.

Puckett and DeJarnett, the payors of the note, were not parties to the garnishment proceedings against Jackson, but were the only parties to the proceedings commenced by Byrn. They were the debtors of Blackman, and by their answer they fully admit their liability.

The judgment of the Circuit Court is reversed, and judgment will be entered here in favor of Byrn against Puckett and DeJarnett for the full amount of the judgment recovered by the former against Blackman, with interest and costs.

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GORE *v.* HOWARD.

(*Nashville.* March 23, 1895.)

1. WILLS. *Estoppel to contest.*

An heir apparent, who, for a valuable consideration, relinquishes to the ancestor his entire expectancy in the latter's estate, is estopped, while he retains the benefit received and his release remains in full force, to institute a contest over the ancestor's will. (*Post, pp. 578–586.*)

Cases cited and approved: Wynn *v.* Spiers, 7 Hum., 394; Bank *v.* Nelson, 3 Head, 634; Cornwell *v.* Cornwell, 11 Hum., 485; Read *v.* Mosby, 87 Tenn., 765; Fitzgerald *v.* Vestal, 4 Sneed, 257; Steele *v.* Frierson, 85 Tenn., 430; 63 Pa. St., 443.

2. EVIDENCE. *Erroneous exclusion.*

Where a paper purporting to be petitioner's release of his entire expectancy in his ancestor's estate is pleaded to estop him to contest the ancestor's will, it is error to exclude evidence tending to show that petitioner did not sign the release. (*Post, p. 587.*)

FROM OVERTON.

Appeal in error from Circuit Court of Overton County. W. M. HAMMOCK, J.

W. W. GOODPASTURE, W. W. WINDLE, and JOSHUA HAILE for Plaintiffs.

J. A. BARNES, and G. B. MURRAY for Defendants.

McALISTER, J. The question presented for determination in this case is whether the petitioners are entitled to have set aside the probate of the will of John Maxwell, deceased, and contest the same upon an issue of *devisavit vel non*. The Circuit Judge was of the opinion that petitioners having, in the lifetime of the testator, released and relinquished to him, for a valuable consideration, all their interest or right of expectancy in his estate, have now no such legal status with reference thereto as would entitle them to wage such a contest.

The testator, John Maxwell, departed this life in May, 1891, after having made and published his last will and testament, which was duly probated in common form in the County Court of Overton County. The testator had been twice married, and left surviving him a widow and six children, three of whom were the issue of the first marriage. By the terms of his will, the testator devised his entire estate, real and personal, to his widow, Lily Ann Maxwell, and her three children, and no provision was made for either of the three children by the first marriage. These three children, it is claimed, had been provided for in the lifetime of the testator, and had relinquished all further interest in his estate. It appears that after the said John Maxwell had intermarried with his second wife, and three children had been born to them, he divided between the three children of his first marriage all of his estate which he had accumulated up to the date of his second

marriage. Each of his three children by the first marriage executed to him a written instrument similar in form to that executed by Robert and Margaret Winton, which is in words and figures following, to wit:

"We, Robert M. Winton and Margaret Winton, his wife, for and in consideration of the sum of $600 advanced by John Maxwell to me, the said Margaret Winton, and applied, to wit, to the purchase of the tract of land on which we now live, and the further consideration of $400 advanced by the said John Maxwell to his daughter, the said Margaret Winton, which is applied towards the purchase of a tract of land bought of John A. Roberts, the title to which is to be made to the said Margaret Winton, and in consideration of other advancements made by the said John Maxwell to said Margaret, not herein specified: We, the said Margaret Winton and Robert M. Winton, her husband, do agree and bind ourselves to accept the several amounts of money and property advanced to the said Margaret, aforesaid, in full satisfaction of all their interest, or the interest of the said Margaret which she now has or may hereafter have in the estate of her father, the said John Maxwell, either in his lifetime or after his death, it being understood by us, and agreed, that the amounts we have received is all that we are ever to receive from the said John Maxwell or his estate, either during his life or after his death; that the said Margaret Winton is to

receive nothing more either as heir or distributee of her said father, John Maxwell. Given under our hands, this third day of May, 1877.

"ROBERT M. WINTON,
"MARGARET WINTON."

This instrument was duly acknowledged in proper form before the County Court Clerk of Overton County, Tennessee, and the privy examination of the married woman was taken in the manner prescribed by law. As already stated, a similar instrument and obligation was executed by the two remaining children of the first marriage.

The will of John Maxwell was probated on the eighteenth of March, 1893, and soon thereafter the three children of the first marriage filed their petition in the County Court of Overton County, seeking to set aside the probate of said will, and praying that said instrument be certified to the Circuit Court for an issue of *devisavit vel non*. The executor and devisees under the will filed an answer to said petition, in which they averred that petitioners, by reason of the releases executed by them in the lifetime of the testator, had relinquished all interest in the estate of John Maxwell, and had no such interest in said estate as would entitle them to contest the validity of said will. The defendants also insisted that the petitioners were estopped by said instruments to claim any interest in said estate. The County Court refused to set aside said probate, and dismissed the petition. On appeal, the Circuit Court

heard the cause upon a transcript of the record of the County Court, upon consideration whereof the decree of the County Court was affirmed. Petitioners appealed to this Court, and have assigned errors.

The cardinal inquiry arising in this case, is in respect to the validity of the releases executed by the children of the first marriage. If said instruments are of binding efficacy, the petitioners had no such interest in the estate of the testator as would entitle them to maintain a proceeding to set aside his will. It is well settled that such persons only as would be entitled to share in the real or personal estate of the deceased if there were no will, or if the will were set aside, are entitled to impeach its validity. Pritchard on Wills and Administration, Sec. 339; *Wynn* v. *Spiers*, 7 Hum.

A stranger will not be permitted to contest the will or disturb the existing probate. A kinsman who is not nearest of kin and who would take nothing under the statutes of distribution if there were no will, cannot contest it. A creditor of an heir of the testator cannot have an issue made to try the validity of the will or in any other way, directly or collaterally, attack the probate in common form in the County Court. *Bank of Tennessee* v. *Nelson*, 3 Head, 634. Nor can a grandson of the testator contest the will, unless it appears that his own father is dead. *Cornwell* v. *Cornwell*, 11 Hum., 485.

The general principle is, therefore, well settled

that whoever appears to contest a will is bound, if required, to show his interest and right to make the contest. Pritchard on Wills and Administration, Sec. 339. It is insisted that, if Maxwell had died intestate, or his last will and testament were successfully impeached, petitioners have, for a valuable consideration, surrendered all interest in the estate, and are thereby precluded from any participation therein. It is insisted, however, on behalf of petitioners, that said releases are inoperative and void because in contravention of public policy, and for the further reason that petitioners, at the time they were signed, were laboring under the disability of coverture. Counsel for petitioners cite in support of this contention *Read* v. *Mosby*, 3 Pick. In that case it was decided that an assignment, without consideration, of his estate in expectancy by an insolvent heir apparent is fraudulent as to existing creditors, and will be set aside at their instance. In that case it appeared that the assignment under which Mrs. Mosby claimed was made by an insolvent debtor. It was not made for a valuable consideration, and simply amounted to a settlement upon the wife by a husband unable, with justice to his creditors, to make such a conveyance. In the case of *Fitzgerald* v. *Vestal*, 4 Sneed, 257, it was held by this Court that a bare expectancy—as, the anticipated interest of an heir in his ancestor's estate—is the subject of a valid contract of sale, and although a Court of Equity scrutinizes such transactions with jealousy and

caution, yet, when the transaction is *bona fide*, and the consideration fair, they will be enforced as an assignment of the property when the right of the vendor attaches. In the later case of *Steele et al.* v. *Frierson et al.*, 1 Pick., 430, the former case was reaffirmed, the Court holding that the sale or assignment in good faith and for a valuable consideration, of the estate in expectancy of an heir apparent, is valid, and will be upheld and enforced in Courts of Equity. It was further held that such a purchaser of the estate in expectancy of an heir apparent takes it subject to advancements made to the heir, but not subject to debts due from the heir to the testator's estate. It has already been seen that the releases in this case were executed in good faith and upon a valuable consideration. It is shown that at the time these releases were made the testator divided among the children of his first marriage all of his estate which he had acquired up to the date of his second marriage, and that these children accepted the money and went into the use and occupation of the land.

There has been no offer on the part of these children to return the property received by them in pursuance of the arrangement with their father; and, while they do not attempt to disaffirm these contracts, as we shall presently see, they still hold on to the consideration.

Pursuing further the question of law already discussed, we perceive no distinction in principle be-

tween the facts presented in the cases of *Fitzgerald* v. *Vestal*, 4 Sneed, and *Steele* v. *Frierson*, in 1 Pickle, and the facts of the case now being adjudged, except that the release in this case was made to the testator himself, and not to any person capable of taking after his death.

A similar question arose in a case in New York —*Kinyon* v. *Kinyon*. In that case the ancestor had conveyed to his four sons all of his real estate, a portion to each son. He conveyed to his son, Albert Kinyon, what was known as the home farm, consisting of about ninety-one acres of land. The son, before the delivery of the deed, executed and acknowledged an instrument, in writing, which, after reciting the deed from his father, stipulated, viz.: "Now therefore, in consideration of such conveyance being made and given to me as aforesaid, I do hereby release, renounce, and set over to my said father all my right, title, claim, and interest whatsoever to all and every part or share in and to his real and personal estate which I may or will have at or upon his death in expectancy, by reason of being a devisee or legatee under any will he has made, or may hereafter make, or by reason of being one of his next of kin, accepting the land herein conveyed to me by him this day." The deed was thereupon delivered by the father to the son, and the son went into the use and occupation of the farm. Upon the death of the ancestor intestate, the question arose whether the son should

have a distributive share of his father's estate, or whether he was barred from such share by the instrument of release. It was held by the Court that the instrument executed by the defendant is valid in equity, and would be enforced as an assignment or release, although made to the ancestor himself, and not to any person capable of taking after his death. The Court cited the case of *Power's Appeal*, 63 Penn. St., 443, in which it was held: "An heir or an expectant devisee or legatee may, in the lifetime of the testator or intestate, in equity, sell or assign his expectant or contingent interest, whatever it may turn out to be, upon the death of the person from whom it may come, which contract, if made upon a valuable consideration, a Court of Equity will enforce. If so, there can be no reason," says the Court, "why a father should not make such a contract with a son which should entirely bar all his claim as an heir to any part of his parent's estate."

The conclusions reached by the Court in the New York case were as follows, to wit: First, that the deed and contract, as between the parties to them, are to be construed together, as constituting one transaction. Second, that the defendant is estopped from questioning the validity of the instrument given by him and from refusing to carry out its provisions, and is estopped from asserting any rights, claim, or interest in the property of the deceased. Third, that, in equity, the instrument is valid and effectual

for the purpose for which it was executed, and is binding on the defendant. *Kinyon* v. *Kinyon*, Vol. XXVII., 627–631.

It is argued that, while such assignments may be protected and enforced in Courts of Equity, that, at law, they are held absolutely void, for the reason there was no title or property interest upon which it could operate. *Read* v. *Mosby*, 3 Pickle, 765. While the proposition is true as applied to the enforcement of such assignments for the recovery of the specific property, it is also true that an estoppel may arise out of such transactions which may be successfully interposed in a Court of Law. It appears from the record that the defendants, distributees, executed those releases, and, as a consideration for executing them, accepted large sums of money from their ancestor, the testator. They have taken no steps to cancel these agreements nor offered to return the money. The defendants still hold on to the fruits of the transaction and yet seek to disaffirm the contract. If they wish to say they were defrauded or overreached in the transaction, and to be relieved from it, they must ask that the whole transaction be set aside, returning what they have received, or, at least, offering to do so. The testator was undoubtedly misled by these petitioners to his prejudice, being induced, by their promise and agreement, to part with large sums, which they appropriated and have enjoyed. We think that, under

these circumstances, they are now estopped from contesting this will.

The last assignment of error is based upon the action of the Circuit Judge in rejecting certain evidence. Counsel for petitioners offered to prove, by Mitchell Winton and his wife, Margaret Winton, that the latter had never signed the release, or authorized anyone to sign it for her. The Circuit Judge refused to permit the introduction of this evidence. This action was clearly erroneous, and, for this error, the judgment must be reversed as to Mitchell Winton and wife, and remanded for a new trial.

COOPER *v.* THE GREAT FALLS COTTON CO.

(*Nashville.* March 27, 1895.)

1. ADVERSE POSSESSION. *As between tenants in common.*

Possession of land by one tenant in common operates against his cotenants where it is intended or understood by all the parties to be adverse. (*Post, pp. 590, 591.*)

2. SAME. *Possessor making improvements.*

The possessor of land, who, with notice of an adverse claim, makes expensive improvements thereon, cannot, on that account, defeat the ejectment suit of the adverse claimants. (*Post, p. 591.*)

3. SAME. *Connecting possessions.*

Connected adverse possessions of land, held pending suit to foreclose mortgage thereon successively, by the purchaser at the original sale in such suit, and by his vendee under title bond, and by the purchaser at a second sale made for the purchase price, are all held under and inure to the benefit of the mortgagor's title or color of title. (*Post, pp. 594–599.*)

Case cited and distinguished: Ellege *v.* Cook, 5 Lea, 622.

4. SAME. *By erection and operation of mill.*

The owner of a water mill situated on a stream acquires, by occupation and operation of the mill, actual adverse possession not only of the mill buildings and wheel pit, but of the bed of the stream to its thread between such points above and below the mill as will afford the free and unobstructed use of the water in the operation of the mill. (*Post, pp. 599–601.*)

Case cited: Waddle *v.* Stuart, 4 Sneed, 534.

FROM WARREN.

Appeal from Chancery Court of Warren County. WALTER S. BEARDEN, Ch.

Cooper *v.* The Great Falls Cotton Co.

SMITH & SONS, W. T. MURRAY, T. C. LIND, and L. D. HILL for Cooper.

F. M. SMITH and PITTS & MEEKS for The Great Falls Cotton Mills Co.

SNODGRASS, Ch. J. The original bill in this case was filed September 21, 1892, by William Cooper, W. B. Hill, and C. P. Hill, against Jesse and H. L. Walling and W. P. Faulkner. It was an ejectment bill, and set up title to certain real estate on, or adjacent to, the Great Falls of the Caney Fork River, the strip immediately in controversy being a small space on the southern side of the river, and being included in a grant for twenty acres issued to John Halterman in 1822. The defendants, Walling and Faulkner, filed an answer disclaiming title to any portion of the land, and showing that it was now the property of the Great Falls Cotton Mills Company.

Thereupon complainant filed an amended bill November 22, 1892, making this corporation defendant, and asserting the same right as against it. The corporation's answer denied that complainant had any title to the land, or any good and valid title as against it, or by adverse possession, or otherwise. Both complainant and defendant averred superior title, both by reason of their title papers and by adverse possession, which each asserted they had had for more than seven and for more than twenty years. This answer of the defendant company set up that Asa

Faulkner made a wheel pit in the water at the Great Falls; that he put in a saw and a grist mill, and operated the same in his lifetime and before he conveyed the property. In 1885 he conveyed it in trust. The trustee resigned, and the land was brought to sale and sold by J. C. Biles, special commissioner, to Jesse Walling and W. P. Faulkner. Walling sold his interest to W. P. Faulkner on April 30, 1892, and Faulkner, on May 6, 1892, sold to the Great Falls Cotton Mills Company.

The statement we have made presents a brief summary of the issue involved. Many questions were asserted and attempted to be made in proof which may be eliminated by brief statement of the results as to them, without extending the discussion or elaborating. Neither party connected with any grant, nor did the possession of complainants, and Bosson, through whom they claimed, which it was insisted by defendant was by permission of defendant's vendors, appear to be such on the weight of the evidence, and, therefore, what possession complainants and their vendors have held will be treated, without more, as being adverse. In the same connection complainants insist that the possession of Asa Faulkner was not adverse to them, because he had bought an interest of one of their vendors, and for some time had held as tenant in common, and consequently his holding had not been adverse. We determine as a fact that Faulkner's holding was adverse. He had bought the land in conflict with a

view to protect himself against litigation, and complainants and their vendors did not understand, nor did he, that his holding on the Warren County side of the river was for both, but, on the contrary, each knew that the claim of the other was adverse.

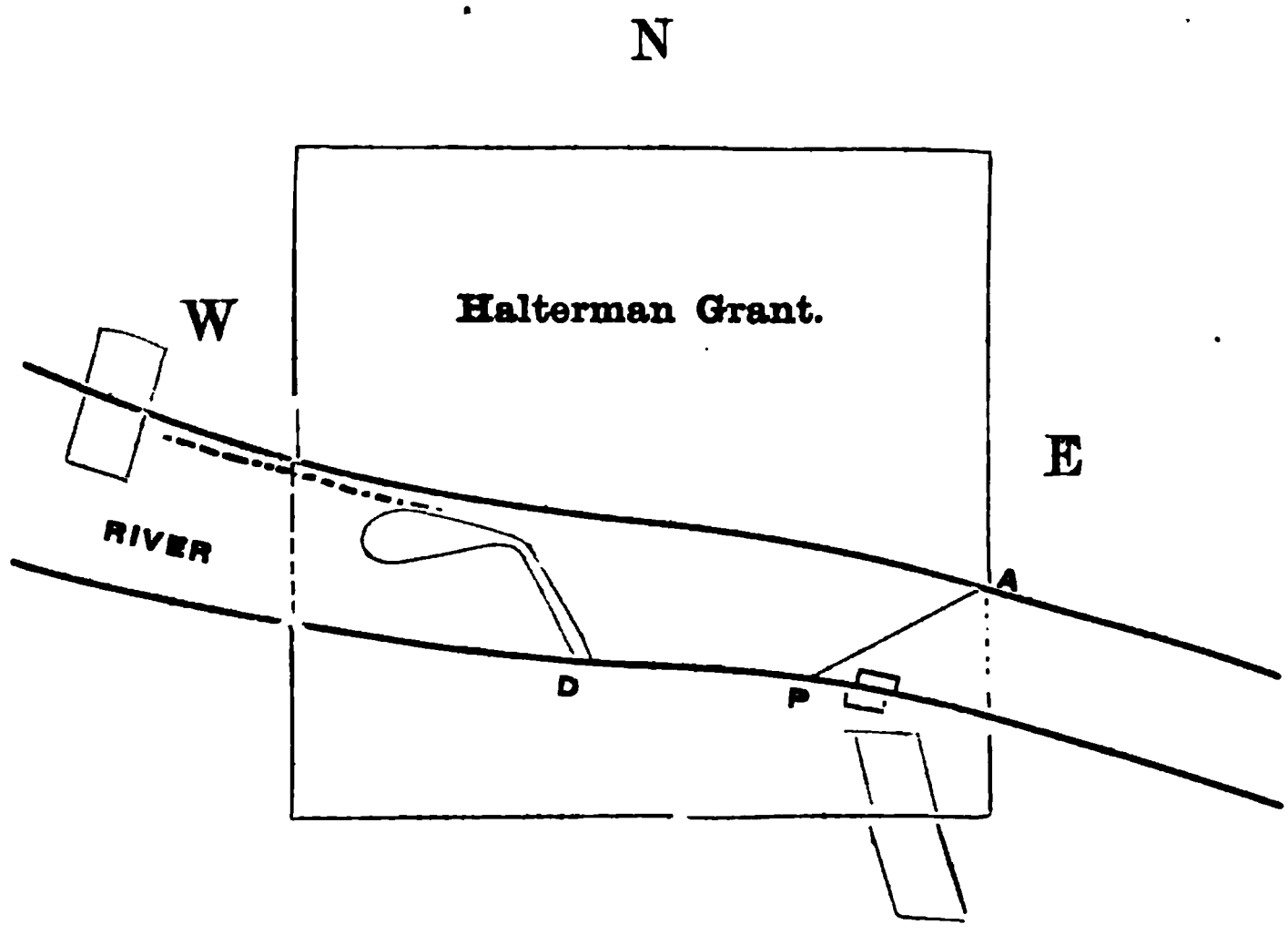
Another question raised is that complainants are estopped to seek to recover this land, because of the fact that expensive improvements had been made by defendant, Faulkner, and with full knowledge of complainants, who did not assert an adverse claim. There is nothing in this defense. As above stated, in respect to the adverse claim of the complainants that defendant was a tenant in common and holding as such, the claims of each were well known to the other, and whatever was done as to improvements was done with the full knowledge of the adverse claim of the complainants, and in the expectation that it would be asserted, as it has been. The claims of each will, therefore, stand upon the merits of the respective titles. Of course it is proper to observe, in this connection, that complainants, if entitled to recover anything, can recover only upon the strength of their own title, and must, therefore, make out a title for themselves. This they have done by showing color of title in themselves and vendors, with seven years adverse possession of a portion of the twenty acres in controversy, and that this was granted land. Bosson, who bought the Halterman land (though the record does not show any connection through and with the Halterman title),

built a dam across the river to the southern bank, sometime about 1843 or 1844. This was maintained for more than seven years—indeed, for more than twenty years. Nothing else occurring, that would have vested title in complainants, and to the full extent of the land described in the Halterman grant. But defendant, and those under whom it claims, had possession on other parts of the land in controversy so as to neutralize the effect of the Bosson possession of the land, and to confine it to that part of the land embraced in the Bosson title actually taken possession of by Bosson, or which can be assumed to have been so possessed by the building and maintaining of a dam across the river as indicated. It may be considered as satisfactorily established, at least settled by the weight of the evidence, that their seven years possession with color of title vested in complainants' vendors title to so much of the land as is now occupied by the wheel pit and race of defendant, prior to the purchases of Asa Faulkner from Cunningham in September and October, 1881.

The material inquiry, therefore, is as to the effect of Faulkner's possession, and those claiming under him since that date, including defendant; for we think, notwithstanding all objections of complainants, it is one continuous possession up to the date of the filing of this bill in 1892. This has been sufficient to vest in defendant title to its building and wheel pit. Whether it extends to the water privi-

lege and so much of the thread of the stream as decreed by the Chancellor, is another question, and remains to be examined in the light of the evidence.

The Chancellor's decree, as we understand it, was on this theory. He decreed as follows, illustrating by the appended diagram:



That complainants were entitled to recover to the southern end of the dam (marked "D" on the diagram) and southeast with the line of the river to point "P" on the diagram; thence west of the wheel pit diagonally northeast and crossing the river, as indicated by the line "P A."

The Chancellor does not give his reasons, and counsel profess themselves to be much at a loss to

divine any, for what each (for both appeal) term this arbitrary and compromise line. But evidently the Chancellor treated complainants' adverse claim and possession under color of title prior to 1881, when Faulkner bought of Cunningham, as having ripened into a perfect title to the southern line on, beyond, or east of the wheel pit, but that Faulkner's possession since that date had been a conflict not only as to the actual wheel pit, but as to the race and necessary flow of water thereto and therefrom, and treated defendant's possession, to that extent, as adverse since said purchase, and that therefore defendant had, under its color of title and such possession, regained of complainants so much of the Halterman land and water as was included in said area, and no more, treating that area as the real possession of Faulkner and the real conflict, which would occasion a divestiture of so much of this land and water out of complainants by virtue of the operation of the statute of limitations, a nowise arbitrary or compromise conclusion, nor one, we think, difficult to comprehend, whatever may be said of its correctness, about which we will inquire later on.

We have already held that it is correct so far as the wheel pit and land occupied by the improvements are concerned. Is it so as to the water above the wheel pit, and to the thread of the stream, the extent of defendants claim?

There are several questions raised which are nec-

essary to be determined in order to adjudge the effect of the holding by defendant and those through whom it claims. It is insisted by complainants that there has been no seven years continuous possession of any part of the land in controversy, because of the fact that Faulkner's possession, such as it was, was broken under these conditions: Faulkner made a deed of trust to the property in 1885 to Jesse Walling, as trustee, to secure the payment of certain debts. Bills were filed in the Chancery Court of Warren County to sell it. Pending these proceedings, Walling resigned, and J. C. Biles was substituted in his stead, and as receiver, to sell the property. It was sold by him, and purchased by two of the sons of Faulkner—Clay and Thomas Faulkner. They sold the property to Moore, Wilder, and McWhirter, giving these parties a title bond, and they assumed, among other things, to pay off the Faulkner notes for the purchase price given to Biles as receiver, and take deeds from him. Moore, Wilder, and McWhirter took possession, and held the property for a year or more, when they failed to pay for it, as did also their vendors, and the land was resold by decree of the Chancery Court to enforce the lien which had been retained for the purchase money. Moore, Wilder, and McWhirter, however, were not, by any kind of pleading, made parties to the proceeding for this purpose; but this sale was had in the original case in which the property was first sold, and to enforce the lien retained

in that case. At this last sale W. P. Faulkner and Jesse Walling became the purchasers. Jesse Walling sold his interest to W. P. Faulkner, and Faulkner sold to the present defendant, The Great Falls Cotton Mills Company.

Complainants make several questions regarding this proceeding, which they insist are fatal to defendant's claim of continuous possession through itself and vendors. They say, first, that the land sold to Clay and Thomas Faulkner, and by Clay and Thomas Faulkner to Moore, Wilder, and McWhirter, was only the one hundred and fifty acre tract (the second purchase of Faulkner from Cunningham), and that this tract did not include the wheel pit, race, and so much of the river as was used by the several parties named, and as is now used by defendant; and, second, that the possession of Moore, Wilder, and McWhirter, was an independent possession for themselves, and cannot be connected with the prior possession of Faulkner, so as to make out the bar of the statute of limitations of seven years, under the case of *Ellege* v. *Cook*, 5 Lea, 622.

Respecting the first of these two propositions, we find the fact to be, that while there were terms employed in the decree, and in the title bond, indicating such a limitation of the property sold as that for which complainants contend, yet, taken altogether, they show that the sales were made under the decree, and by Clay and Thomas Faulkner, intending to pass the whole property, and there were terms employed

sufficient to include the whole property, and carry out the manifest intent of all the parties, which was to sell on the one side and purchase on the other the manufacturing site and water power together, and the purchasers assumed to pay the Faulkner notes, and take title from Biles, receiver, as the Faulkners, their vendors, were to do. It is not necessary that this decree and bond should be copied and analyzed to show the correctness of this result. We are satisfied so to decide it without quotation or further elaboration.

As to the second proposition advanced by the complainants, that the possession of Moore, Wilder, and McWhirter could not be considered as under the Faulkner title, or to make out the seven years possession claimed to have been held by defendant, we hold it is not well taken. The property, as already stated, was brought to sale in the Chancery Court under bills filed for that purpose, lien being retained to secure the purchase money. While the case was still pending, and while the first vendees had not complied with the terms of the sale, by payment, so as to extinguish the lien, these vendees themselves, and those put in possession by them, under title bond, continued to hold possession of the property. The case still pending in the Chancery Court for the enforcement of the lien, it was enforced, a resale made to Walling and Faulkner, and the property subsequently paid for and the lien extinguished. All this was but in effectuation of the original proceeding to

sell. The purchasers, original and subsequent, came in under this proceeding, and in subordination to the Faulkner title, and subject to the orders and decrees of the Court to perfect a sale by the collection of the purchase money and discharge of the lien. Their holdings, therefore, were not adverse to the Faulkner title, but strictly as claimants thereunder. In such case as is presented in this record, upon the facts stated, the holding must be treated to be under the title through which they were holding. The case of *Ellege* v. *Cook*, is not in contravention of this theory. Whether that case was right upon its own facts, we do not deem it necessary to express, at this time, any opinion. Certain it is, that it will not be extended to any case not strictly within it.

A different holding to that now made in this case would establish the proposition, that if A file a bill against B to foreclose a mortgage, or enforce a lien on B's property, and obtain a decree for that purpose, and the property be sold and put in the possession of a purchaser, a lien being retained to secure the payment of the purchase money, and the purchaser fails to pay it, should A proceed, in the same case, to enforce the lien retained and resell the property, the holding of the purchaser during the suit would have to be held, not under the title they purchased, but adverse thereto, or especially so if the purchaser who bought at the sale should, pending the case, resell to another (who would, of course, come in in subordination to the lien, and from whom the

property would be taken by the enforcement of the lien retained in the case). Such a doctrine would be ruinous to litigants occupying the relation stated, is wholly unreasonable, and cannot prevail in this State. It does not in any other, so far as we are advised.

Another insistence of complainants is that, granting the defendant's and its vendors' possession to have been continuous, and their claim to have been under both the Faulkner deeds (the first deed making a ribbon strip from the thread of the stream to low water mark, and the second conveying 150 acres on the south side of the stream up to low water mark), then they say that the defendant's possession could only operate to retake from complainants the wheel pit actually occupied by defendant and its predecessors in title. Their second theory in advocacy of that proposition (the first being that the Bosson title, by virtue of seven years possession after 1843, had ripened into a perfect title to the full extent of the twenty (20) acre boundary of the Halterman grant) is that when Faulkner entered into possession under his deeds from Cunningham, which covered a part of the land actually occupied by the Bosson dam, that his possession would only inure to his benefit, to reclaim from the Bosson title so much of the twenty (20) acres (so much of the bank of the stream and the stream itself) as Faulkner and his vendees actually occupied, under the case of *Waddle* v. *Stuart*, 4 Sneed, 534.

The complainants insist that Faulkner and his

vendees can only be held to have actually occupied the space of ground used for their wheel pit, and cannot be held to have had any occupancy or possession of so much of the water as flowed over the wheel used in the pit, or of any portion of the river bed over which the water was thus made to flow. In this complainants are in error. Faulkner's possession of the water flowing over the wheel was all he needed, and practically all that he could take. He made an excavation in the river, forming a kind of race, and turned the flow of the water over his wheel. In this form its use was continued for the full period of seven years, and he, and those holding under him, must be held to have acquired the same right to the land, and water flowing over it to the thread of the stream above the wheel pit, as they acquired to the wheel pit itself.

The Chancellor's decree was erroneous in holding that complainants did not have the right to recover the remainder of the land in controversy from the abutment of their dam on the south bank, east with low water mark to a point west of the wheel pit, where the flow of the water will not be impeded; north to the center of the stream; thence east with the center of the stream to the east line of the Halterman grant, and around with said line to the beginning.

Defendant, in fact, in open Court, when the final decree was rendered, disclaimed title north of the thread of the stream, and it does so now, and in-

sists, for that reason, that it should not have been taxed with any part of the cost, as was done by the Chancellor. As a matter of right, however, without regard to this disclaimer, the complainants were and are entitled to recover the land in controversy, north of the thread of the stream and west of the Halterman east line, which was not given them by the Chancellor, nor is defendant entitled to avoid any cost on account of such disclaimer. That result only follows where a complainant's right to recover is defeated by a disclaimer in the pleadings.

Complainants, therefore, had the right to recover this much of the land in addition to that which the Chancellor gave them, and they are entitled to full cost. The Chancellor's decree, therefore, is so modified, and decree will be entered here in accordance with this opinion. The defendant will pay the cost of both Courts.

JONES, ASSIGNEE, *v.* WHITWORTH.

(*Nashville.* April 22, 1895.)

1. CORPORATIONS. *Liability of stockholders; pleadings.*

Creditors of an insolvent corporation, or an assignee for their benefit, cannot maintain bill against its stock subscribers who have paid their subscriptions in property which the corporation was legally authorized to buy or receive, for the difference between the face value of the subscription and the real value of the property, without distinct averment that the overvaluation of the property was intentionally fraudulent or so gross and palpable as to be constructively fraudulent as to corporate creditors. Averment that property was "not conveyed at a fair cash value, but very far in excess of it," is insufficient. (*Post, pp. 605–608.*)

Cases cited and approved: Kelley Bros. *v.* Fletcher, *ante*, p. 1; Shields *v.* Clifton Hill Land Co., *ante*, p. 160; 5 Dillon, 50; 31 N. E. Rep., 362; 119 U. S., 345; 110 Ind., 417; 78 Wis., 427 (S. C., 23 Am. St. R., 419–421); 92 Ala., 407 (S. C., 25 Am. St. R., 82, 83).

Question reserved: Whether the proper measure of relief in such case is recovery of difference or rescission of contract. (*Post, p. 614.*)

2. SAME. *Stock subscriptions inure to benefit of all creditors.*

Unpaid stock subscriptions are made by statute in this State to inure to the benefit of all creditors alike, whether their debts were created before or after the subscriptions were made. (*Post, pp. 608–610.*)

Code construed: § 1708 (M. & V.).

Act construed: Acts 1875, Ch. 142, Sec. 5.

Case cited and approved: Shields v. Clifton Hill Land Co., *ante*, p. 158.

Cited and distinguished: 3 Mason, 308; 13 Wis., 60; 11 Ala., 437; 35 N. J. Eq., 501; 17 Wall., 611; 42 Minn., 327 (S. C., 18 Am. St. R., 516); 139 U. S., 436; 48 Minn., 174 (S. C., 31 Am. St. R., 646).

3. SAME. *Insufficient averments to hold stock subscriber.*

The creditors of an insolvent corporation, or an assignee for their benefit, cannot recover against its stockholder upon the averment that $59,800 of unsubscribed stock was issued to him as compensation for services rendered in negotiating the sale of $85,000 of its bonds, without any averment that the transaction was fraudulent, or that the compensation was unreasonable. He became purchaser, not subscriber, of the stock. (*Post, pp. 621–623.*)

4. STATUTE OF LIMITATIONS. *Of six and ten years do not bar suit by corporate creditors against stockholders, when.*

The statute of limitations of six and ten years do not begin to run against the right of corporate creditors to enforce the liability of stockholders for the difference between the amount of their subscriptions and the real value of land conveyed to the corporation at a fraudulent overvaluation in payment therefor, until the legal insolvency of the corporation has occurred. (*Post, pp. 610–613.*)

Cases cited and approved: Moses *v.* Ocoee Bank, 1 Lea, 404; Marr *v.* Bank, 4 Lea, 593; 105 U. S., 143: 3 Am. St. Rep., 29, 30; *Ib.*, 881.

5. SAME. *Of two years protects estates of deceased stockholders, when.*

The estate of a deceased stockholder is protected by the statute of limitations of two (and one half) years, where suit for collection of difference between the amount of his subscription and the real value of land conveyed at a fraudulent overvaluation in payment thereof, is brought against his personal representative by resident corporate creditors, or their resident assignee, more than two and one half years after the legal insolvency of the corporation had occurred. This statute runs from date of such insolvency, and not from date of the fraudulent transaction or of the administration. (*Post, pp. 614–617.*)

Code construed: §§ 3117, 3481 (M. & V.); §§ 2279, 2784 (T. & S.).

Cases cited and approved: Bradford *v.* McLemore, 3 Yer., 319; Trott *v.* West, 9 Yer., 436; Atkinson *v.* Brooks, 10 Yer., 485.

6. SAME. *Six months after decedent's death not deducted, when.*

When a creditor's right to sue does not accrue for more than six months after administration upon his debtor's estate, his suit is barred, unless it is instituted within two years after the

accrual of his right to sue. An additional six months is not allowed in such case. (*Post, p. 617.*)

Code construed: §§ 3112, 3454 (M. & V.); §§ 2274, 2760 (T. & S.)

7. SAME. *Of seven years for protection of decedent's estate.*

The statute of limitations of seven years for protection of decedents' estates begins to run from the date of the accrual of the creditor's right to sue, and not from date of administration, where the cause of action accrued in decedent's lifetime, but the right to sue thereon accrued after his death. (*Post, pp. 617–621.*)

Code construed: §§ 3119, 3483 (M. & V.); §§ 2281, 2786 (T. & S.).

Cases cited and approved: Smith *v.* Goodlett, 92 Tenn., 232; Fitzsimmons *v.* Johnson, 90 Tenn., 441; Henderson *v.* Tipton, 88 Tenn., 258; Henry *v.* Mills, 1 Lea, 153; Caplinger *v.* Vaden, 5 Hum., 629; Reeves *v.* Pulliam, 7 Bax., 119 (S. C., 9 Bax., 153, and 1 Leg. Rep., 236); Moses *v.* Bank, 1 Lea, 404; Marr *v.* Bank, 4 Lea, 593.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. ANDREW ALLISON, Ch.

ROBERT L. MORRIS for Joncs.

STOKES & STOKES, GRANBERY & MARKS, STEGER, WASHINGTON & JACKSON for Whitworth.

VERTREES & VERTREES for Killebrew.

CALDWELL, J. On June 5, 1882, the Rockdale Manufacturing Company was incorporated under Sec. 11, Ch. 142, Acts of 1875, and, at a meeting of its directors, on June 9, 1882, the capital stock of

the company was fixed at $250,000, in equal shares of $100 each. On the latter day, James Whitworth and five other directors subscribed jointly for $135,000 of the capital stock, and conveyed to the company about 5,742 acres of land, in payment of their subscription.

The corporate name of the company was changed in August, 1889, after which time it was known, and did business, as the Rockdale Mining & Manufacturing Company, with it principal business office at Nashville, Tennessee.

During the year 1889, the company executed first mortgage coupon bonds to the amount of $100,000, and issued $59,800 of its unsubscribed stock to J. B. Killebrew. In the course of its business, in 1891, the Rockdale Mining & Manufacturing Company became indebted to insolvency, and, on November 17 of that year, made a general assignment of its property for the benefit of creditors. September 4, 1894, the assignee filed this bill, at the instance of unsatisfied creditors, alleging the insolvency of the company and the exhaustion of its property in the payment of debts, and seeking recoveries against the joint subscribers for the $135,000 of stock heretofore mentioned, and against J. B. Killebrew. The bill was dismissed on demurrer, and the assignee has appealed.

1. The statute under which the company was incorporated provides, among other things, that "nothing but cash shall be taken in payment of the capital

stock, or land at a fair cash valuation." With this provision in view, complainant alleged in his original bill that the aforesaid 5,742 acres of land were "not conveyed [to the company] at a fair cash value, but very far in excess of it;" and upon this allegation he prayed for a money decree against the vendors for the difference between the par value of the $135,000 of stock, and the real value of said land.

This part of the bill was demurred to as not presenting a good cause of action, because it did not allege a fraudulent and intentional overvaluation of the land. The demurrer was sustained by the Chancellor, with leave to the complainant to cure the supposed defect by an amendment, which was done at once. Thereafter, the bill, as amended, was dismissed upon other grounds of demurrer, which will be considered hereafter in detail. Not being sure that he can prove an intentional and fraudulent overvaluation, complainant, on appeal, asks this Court to decide that his original allegation presented a good cause of action, and that the Chancellor erred in holding that it did not.

We think that the original allegation was not altogether sufficient. A "fair cash valuation" is such a price as honest and impartial men would naturally and reasonably place upon any given piece of property in view of its useful capabilities and the end to be accomplished by its sale and purchase. The same piece of property has different values at dif-

ferent times, and in different situations; it will command one price when desired for one purpose, and another price when desired for another purpose; and about all these fair-minded men may honestly entertain a wide difference of opinion. Hence, it is not a sufficient impeachment of the *bona fides* of a sale and purchase of land, which vendor and vendee were competent to make, for the pleader to say, without more, and in general terms, that the land was "not conveyed at a fair cash value, but very far in excess of it." The impeaching language is too general. It does not give the Court that degree of information requisite as the basis of a decree annulling and setting aside a transaction authorized by law and regular upon its face. The question of value, as already stated, is one about which honest and impartial men may differ; consequently, the complaining party must do more than merely assert his own opinion of the transaction in his bill.

This Court said, upon ample authority, in the late cases of *Kelley Bros.* v. *Fletcher*, *ante*, *p.* 1, and *Shields* v. *Clifton Hill Land Co.*, *ante*, *p.* 160, that "it is plain law that a contract whereby a corporation receives needed property in the payment of stock subscription, is presumed, in the first instance, to be valid and binding upon all parties concerned; and that it must stand as made, and operate as intended, until impeached by appropriate pleading and proof." What would be "appropriate pleading" was not decided, because in those cases the allega-

tion was one of nonpayment, and not one of payment in property at an overvaluation.

2. We think the true rule is, and should be, that creditors of an insolvent corporation, or its assignee for the benefit of corporate creditors, can have relief against a stock subscriber who has paid his subscription in property which the corporation was legally authorized to buy, only upon allegation and proof that the property was sold at an overvaluation which was intentionally fraudulent, or which was so gross as to be constructively fraudulent, as against corporate creditors. The bill should allege facts making a case of actual or constructive fraud. *Phelan* v. *Hazard*, 5 Dillon, 50; *Clow* v. *Brown*, 31 N. E. R., 362; *Coit* v. *Amalgamating Co.*, 119 U. S., 345; *Coffin* v. *Ransdell*, 110 Ind., 417; *Gogebec Inv. Co.* v. *Iron Chief Min. Co.*, 78 Wis., 427 (S. C., 23 Am. St. Rep., 419–421); *Elyton Land Co.* v. *Birmingham W. & E. Co.*, 92 Ala., 407 (S. C., 25 Am. St. Rep., 82, 83).

3. One ground of demurrer upon which the bill, as amended, was dismissed, was that said bill did not show or allege that those for whose benefit the suit was brought were subsequent creditors—that is, creditors whose debts were created after, and not before, the subscription for the $135,000 of stock was made. The action of the Chancellor in this behalf was erroneous. It is true that, what is known in the books as the "trust fund doctrine," that through which complainant seeks relief in this case, had its

origin in, and is generally sustained upon, the idea of actual or presumed reliance of the creditor upon the capital stock of the corporation as security for his debt at the time it was created (*Wood* v. *Dummer*, 3 Mason, 308; *Adler* v. *Manufacturing Co.*, 13 Wis., 60; *Allen* v. *Railroad Co.*, 11 Ala., 437; *Wetherbee* v. *Baker*, 35 N. J. Eq., 501; *Sawyer* v. *Hoag*, 17 Wall., 611), and that, as a consequence, antecedent creditors, who could have had no such reliance, cannot successfully invoke the rule. *First National Bank* v. *Gustin Minerva Con. Min. Co.*, 42 Minn., 327 (S. C., 18 Am. St. R., 516); *Handley* v. *Stutz*, 139 U. S., 436; *Hospes* v. *N. W. Manufacturing Co.*, 48 Minn., 174 (S. C., 31 Am. St. R., 646); *Shields* v. *Clifton H. L. Co.*, *ante*, p. 123. But in this State, since 1875, the question is controlled by general statute, whose language is as follows: "The amount of any unpaid stock due from a subscriber to the corporation shall be a fund for the payment of any debts due from the corporation; the transfer of stock by any subscriber does not relieve him from payment, unless his transferee has paid up all or any of the balance due on said original subscription." Acts 1875, p. 237, Ch. 142, Sec. 5; M. & V. Code, § 1708. "What does this mean? What is made a fund for the payment of debts? 'Any unpaid stock.' What debts are contemplated? 'Any debts due from the corporation.' 'Any unpaid stock' means all unpaid stock, and 'any debts due from the corporation' means all debts due

from the corporation—that is to say, all unpaid stock shall be a fund for the payment of all debts of the corporation. No subscriber for unpaid stock can escape liability, and no corporate debt shall go unpaid, so far as the capital stock is concerned. The liability attaches to all subscribers; the security extends to all creditors. No subscriber whose stock remains unpaid can escape liability, and no creditor who has a valid debt can be denied his security. Nothing is said in the statute with respect to the time the subscription shall be made, nor as to the time the debts shall be created. No limitation is made in either case. The clear and plain meaning of the statute is, that all unpaid stock, whenever subscribed, shall be a fund for the payment of all corporate debts, whenever created." *Shields* v. *Clifton Hill Land Co.*, *ante*, p. 158.

4. The four of the six subscribers for the $135,000 of stock, who are living, demurred to the bill, as amended, because it showed upon its face that the conveyance of the land for the stock occurred more than six years, and more than ten years, before the commencement of this suit, and that the right of action alleged was, therefore, barred by the statutes of limitation of six and of ten years.

This ground of demurrer was also erroneously sustained. The bill does show, as already stated, that the transaction complained of took place on June 9, 1882, and that this suit was not commenced until September 4, 1894—more than twelve years there-

after; nevertheless, it does not present a case in which the right of action alleged was barred by either of the statutes relied upon. That right of action did not accrue when the deed was made, nor until the corporation became insolvent, and made its general assignment, on November 17, 1891; and, of course, the statutes of limitation did not begin to run in favor of these demurrants until the accrual of the right of action against them, which was, at most, less than three years before this bill was filed. The theory of the bill is, that, by reason of the fraudulent overvaluation of the land, the subscribers for the $135,000 of stock are chargeable, as for so much unpaid stock, with the difference between the par value of the stock and the real value of the land; and that is the case intended to be met by the demurrer. The statute of limitation begins to run in favor of a subscriber for unpaid stock only when a call is made, either by the directors or by a Court of Equity; or when the insolvency of the corporation is established, either by a general assignment or by a judgment and return of *nulla bona*. Wood Lim. Ac., Sec. 149; Waite on Insl. Corp., Sec. 631; 2 Spelling Pri. Corp., Sec. 826; Cook on S. & S., Sec. 195; *Moses* v. *Ocoee Bank*, 1 Lea, 404; *Marr* v. *Bank of West Tennessee*, 4 Lea, 593; *Scoville* v. *Thayer*, 105 U. S., 143; *Thompson* v. *Reno Savings Bank*, 3 Am. St. R. (note), 8, 29, 30; *Ib.*, 881.

In the present case no call is alleged ever to

have been made, either by the directors of the company or by a Court of Equity, and no creditor is shown to have obtained a judgment and return of *nulla bona*, so as thereby to put the statute in operation. The only thing alleged that would have given the corporate creditors, or the assignee for them, a right to sue the stock subscribers personally is the insolvency of the corporation and the consequent general assignment of all the corporate property; and that is alleged to have occurred on November 17, 1891, only about two years nine and a half months before this suit was brought. This right of action accrued, and the statutes of limitation began to run, in favor of the defendants on that day, but not sooner; hence, the suit is not barred by either the ten or the six years statute.

5. It is well to observe that the bill, though proceeding upon that theory, does not present the ordinary case of unpaid subscriptions to capital stock. Complainant does not allege a money subscription partly paid in cash, nor a money subscription paid in property at a fraudulent overvaluation. He alleges a subscription for "one hundred and thirty-five thousand dollars of the capital stock of said company, payable in iron lands conveyed to them by deed of W. J. Whitthorne;" and that, "pursuant to said subscription," the subscribers referred to conveyed those lands to the company in payment of the stock. The charge is not that money was subscribed, but that lands were subscribed, and that

lands were paid as subscribed, though at a fraudulent overvaluation.

We have found no case with similar facts, in which the statute of limitation has been considered with respect to the rights of corporate creditors. When the statute begins to run against such creditors, where the subscription was made in property, and paid as made, though at a fraudulent overvaluation to their injury, is a question that appears to be *res integra*. Yet, the solution of the question would seem to be clear and easy upon principle. In this aspect of the bill, as well as in that first considered, the statute of limitation would hardly begin to run against corporate creditors, or against the assignee suing for their benefit, until they acquired a right to sue the subscribers. That right did not and could not accrue so long as the company continued solvent. It did not accrue on June 9, 1882, when the fraud is alleged to have been committed, but on November 17, 1891, when the company became insolvent and assigned its property. No corporate creditor has a right of action against subscribers for unpaid stock, in whatever form, or for any other liability to the corporation, while it is a going concern, and able to pay all of its debts as they mature. Such right of action accrues to the creditor only when insolvency occurs to the corporation, and the statute of limitation can, in no case, begin to run against him before that time. He must have a right to sue before he can be barred.

6. Whether the facts alleged in the bill, if established by the proof, will justify the specific relief therein sought, or will only warrant a rescission, is not clear from the authorities. The former view is ably maintained in the well-considered case of *Elyton Land Co.* v. *Birmingham W. & E. Co.*, 92 Ala., 407 (S. C., 25 Am. St. R., 65–83). That question, however, is not made by any of the demurrers in this case, and, therefore, cannot be authoritatively decided at this time.

7. R. H. Gardner and W. H. Evans, the other two subscribers for the $135,000, died several years ago, and administration was duly granted upon their estates December 24, 1883, and May 14, 1884, respectively; and their personal representatives are sued in this case, in connection with the four surviving subscribers.

The administrators of Evans demurred to the bill, and in their demurrer claimed that complainant's suit, as to them, was barred by the statute of limitation of two years. This ground of demurrer was properly sustained.

The statute relied on had its origin in Sec. 4, Ch. 23, Acts of 1789, whose language was as follows: "That the creditors of any person or persons deceased, if he or they reside within this State, shall, within two years, and, if they reside without the limits of this State, shall, within three years, from the qualification of the executors or administrators, exhibit and make demand of their respective accounts,

debts, and claims of every kind whatever to such executors or administrators; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery of his, her, or their debt as above specified, within the aforesaid time limited, he, she, or they shall forever be debarred from the recovery of his, her, or their debt in any Court of Law or Equity, or before any Justice of the Peace, within this State; *Provided*, That nothing in this Act shall extend to debar infants, persons *non compos*, or *femes covert* to bring their several actions after the expiration of the term above mentioned, provided such actions be brought within one year after the coming to lawful age, sound mind, or discoverture of such persons; *Provided also*, That, if any creditor who, after making demand of his debt or claim, shall delay to bring suit at the special request of the executors or administrators, that then and in that case the said debt or demand shall not be barred during the time of the indulgence." 1 Scott's Laws of Tenn., pp. 410, 411.

This provision, though not in terms so stating, was clearly intended to embrace "accounts, debts, and claims" not due at the time of the qualification of the executor or administrator, as well as such as were due at that time; the specified period of limitation to begin, however, at that date as to those then due, and at the date of their maturity as to those subsequently maturing. *Bradford* v. *McLemore*,

3 Yer., 319; *Trott* v. *West*, 9 Yer., 436; *Atkinson* v. *Brooks*, 10 Yer., 485.

It was made the basis of two sections of the Code of 1858; one of those sections appearing in the article relating to the "limitation of suit against personal representatives," and the other appearing in the article relating to the "limitation of actions other than real." The former, which like the original act fails to distinguish between, and to specifically include debts not due and debts due at the time of the qualification of the personal representative, is as follows: "The creditors of deceased persons, if they reside within this State, shall within two years, and if without, shall within three years, from the qualification of the executor or administrator, exhibit to them their accounts, debts, and claims, and make demand and bring suit for the recovery thereof, or be forever barred in law and equity." Code, § 2279. And the latter, which, following the previous judicial construction, clearly makes that distinction and inclusion, is in these words: "Actions against the personal representatives of a deceased person shall be commenced by a resident of the State within two years, and by a nonresident within three years after the qualification of the personal representative, if the cause of action accrued in the lifetime of the deceased, or, otherwise, from the time the cause of action accrued." Code, § 2784.

Under either or both of these sections, as under the original act, the period of limitation begins only

when two things concur—(1) there must be a personal representative capable of being sued, and (2) there must be a creditor with a present right to sue.

The administrators of Evans were qualified in May, 1884, as already stated, but this statute did not begin to run against complainant at that time, because he did not then have a right to sue. His right of action did not accrue, and, consequently, the statute was not put in motion, until the company made its general assignment in November, 1891. This latter date, however, was two years nine and a half months before the commencement of this suit on September 4, 1894; hence, the bar of the statute is complete.

8. The first six months after their qualification, during which suit could not have been maintained against the administrators of Evans (Code, § 2274), and during which the two years statute did not begin to run in their favor (Code, § 2760), expired long before this cause of action accrued; and, as a consequence, that period is not to be subtracted from the time elapsing between the accrual of the action and the commencement of the suit.

9. The personal representatives of both Evans and Gardner demurred to the bill, and relied upon the statute of limitation of seven years as a bar to complainant's action. This demurrer was erroneously sustained as to both estates.

It has been truly said in many cases that the seven years statute in favor of the estates of dead men establishes a positive prescription, not only bar-

ring the remedy, as do the ordinary statutes of limitation, but actually extinguishing the right of action (*Smith* v. *Goodlett*, 92 Tenn., 232; *Fitzsimmons* v. *Johnson*, 90 Tenn., 441; *Henderson* v. *Tipton*, 88 Tenn., 258, and other cases in those cases cited); but we are not aware that it has ever been held to operate to the extinguishment of a right of action that did not accrue full seven years before the commencement of the suit, and we do not think it open to such a construction in any case. "The Legislature could never be held to intend, unless they said so in so many words, that a person should be barred of his action before the right to sue had accrued." *Henry* v. *Mills*, 1 Lea, 153.

The seven years statute in question comes from Section 9, Chapter 48, Acts of 1715, which provides "that creditors of any person deceased shall make their claim within seven years after the death of such debtor; otherwise such creditor shall be forever barred." 1 Scott's Laws of Tenn., p. 33.

In the year 1843 this Court held with respect to that statute, as it had previously held as to the two and three years statute just considered, that the contemplated period of limitations related alike to debts due and to debts not due at the death of the decedent, but that it began to run, as to the latter class of debts, only when the creditor had a right to sue—when his cause of action accrued—though that might be long after the death of the testator or intestate. *Caplinger* v. *Vaden*, 5 Hum., 483.

Fifteen years after that holding the seven years statute was also carried into the Code in two separate sections (2281 and 2786), one into each of the two articles in which the two and three years statute appears. Section 2281 includes the first proviso of Section 4, Chapter 23, Acts of 1789, and likewise the seven years statute as judicially construed by this Court fifteen years before the adoption of the Code. Its language, with subdivisions and their origin indicated, is as follows: "Infants, persons of unsound mind, and married women may bring their several actions within one year after the removal of their respective disabilities, notwithstanding the lapse of said periods of two and three years [Acts 1789, Ch. 23, Sec. 4, first proviso], so that suit be brought within seven years after the death of the debtor, if the cause of action accrued in his lifetime, or, otherwise, within seven years from the time the cause of action accrued." Acts 1715, Ch. 48, Sec. 9, as construed in *Caplinger* v. *Vaden*, 5 Hum., 483.

Section 2786 embodies neither that proviso nor that judicial construction, but contains substantially the same language as that originally employed in Section 9, Chapter 48, Acts of 1715, and is as follows: "But all actions against the personal representatives of a decedent, for demands against such decedent, shall be brought within seven years after his death, notwithstanding any disability existing, otherwise they will be forever barred."

Why the codifiers should have included the judicial construction of the Act of 1715, as announced in *Caplinger* v. *Vaden*, *supra*, in § 2281 of the Code, and not in § 2786, it is not easy to understand; but, whatever the reason may have been, the two sections have the same meaning, as we understand them, the former carrying its own interpretation upon its face, and the latter leaving the interpretation to the Courts; and, whether construed together as parts of the same general law, or separately, the conclusion seems to us inevitable that the contemplated period of seven years cannot begin under either until the creditor's right of action accrues, whenever that may be. If the cause of action accrue in the lifetime of the debtor, the statute begins to run at the time of his death, and if the cause of action accrue after his death, the statute begins to run at the time of the accrual of the action. Section 2281 so declares in express terms, and § 2786 has the same meaning, when subjected to the rule of construction applied to the original act in *Caplinger* v. *Vaden*, *supra*. Indeed, § 2786 was itself so construed in *Reeves* v. *Pulliam*, 1 Leg. R., 236 (S. C., 7 Bax., 119, and 9 Bax., 153), upon the authority of that case, and to same effect are 1 Lea, 404, and 4 Lea, 593.

It has been seen already that the cause of action here sued upon did not accrue until November 17, 1891, from which it follows that, notwithstanding Gardner and Evans died more than ten years before

the commencement of this suit, the seven years statute of limitation is no protection to their estates.

If Gardner and Evans had executed their promissory note to A. B. on the ninth of June, 1882 (when the deed was executed to the company), to become due and payable on the seventeenth of November, 1891 (when the company made its general assignment and corporate creditors for the first time became entitled to sue the subscribers upon the present cause of action), that note would not have been barred by the seven years statute of limitation on the fourth of September, 1894 (when this suit was commenced), though both of them had been dead more than ten years at that time. In that case, as in the one at bar, that statute would have begun to run when the cause of action accrued, and not when Gardner and Evans died. A creditor cannot be barred for not suing when he has no right to sue. The statute operates against present and not against future rights of action.

It was distinctly decided in the cases of *Moses* v. *Ocoee Bank*, 1 Lea, 404, and of *Marr* v. *Bank of West Tennessee*, 4 Lea, 593, that the statutes of limitation would not begin to run in favor of the personal representatives of deceased stockholders, in suits for the collection of unpaid stock, until the stock had become due and the right to sue for non-payment had been matured by a proper call for a payment of the stock.

10. Upon the allegation that the Rockdale Mining

& Manufacturing Company issued to J. B. Killebrew $59,800 of its unsubscribed capital stock, "as compensation for his services in negotiating the sale of" $85,000 of its first mortgage coupon bonds, complainant seeks to charge him "with so much of the said stock, at a cash valuation, as may be a proper *pro rata* from him to satisfy unpaid debts of the company." Killebrew demurred to this part of the bill because it did not allege that the compensation received by him was unreasonable for the services rendered, nor that the transaction whereby he obtained the stock was fraudulent. This assignment of demurrer was well made, and was properly sustained. The allegation against Killebrew is wholly insufficient to charge him with liability for any sum. Were it alleged that he subscribed for the $59,800 of stock, thereby binding himself to pay that amount of money, and that he was allowed to pay the subscription and discharge that liability by rendering the services mentioned, there would be a case against him; for the liability so discharged would be so greatly out of proportion to the benefit bestowed as to justify the legal inference of bad faith and fraud. It could not be true that a man would earn $59,800 by simply negotiating the sale of $85,000 of bonds. But that is not the case made in the bill. There is no allegation that Killebrew had subscribed for the stock, or that he owed the company for it; nor is there any statement in the bill as to the value of the stock. In other words, there is no charge of undervaluation

of the stock nor of overvaluation of Killebrew's services, nor any statement from which either can be reasonably inferred. For aught the Court knows from the bill, the stock may have had very little or no market value; and taking the stock as he seems from the language of the bill to have done, he could in no event have been liable for more than its market value; unless, indeed, he bound himself by contract to pay more than that for it. The law fixed no liability upon him as a mere purchaser, and not a subscriber, to pay the par value of the stock.

Modify as indicated in this opinion, and remand for further proceedings.

NOTE OF DISSENT.

WILKES, J. I do not concur in the first rule laid down by the majority, and for the grounds of my nonconcurrence refer to my dissent in the case of *Shields* v. *Clifton Hill Land Company et al.* On all other questions presented and decided I concur.

AMERICAN NATIONAL BANK *v.* JUNK BROS.

(*Nashville.* May 3, 1895.)

1. BILLS AND NOTES. *Liability of indorser upon note made for his accommodation.*

Where a note is made for the indorser's accommodation, it is his duty to provide funds to meet it at maturity, and he is, therefore, bound to the holder without presentment, protest, or notice. (*Post*, *p.* 625.)

Case cited and approved: Black *v.* Fizer, 10 Heis., 48.

2. SAME. *Notice of protest to insolvent corporation.*

Notice of protest for nonpayment of negotiable paper is sufficient, though not actually received by the company, where the indorser is an insolvent corporation that had made a general assignment for the benefit of its creditors, and abandoned its business, and the notice, addressed to the corporation, was duly received, opened, and filed by a clerk, the assignee at the former office of the company, where its affairs were being wound up. (*Post*, *pp.* 625–631.)

Cases cited and approved: Harris *v.* Memphis Bank, 4 Hum., 518; 4 Howard, 336; 63 Maine, 340; 3 Wend., 408; 51 N. Y., 148; 142 Mass., 290; L. R., Ch. Div., 795; 79 Maine, 376.

3. SAME. *Same.*

Notice to the indorser's assignee of protest of negotiable paper for nonpayment is sufficient where the indorser has made a general assignment for the benefit of his creditors. (*Post*, *pp.* 631–634.)

Case cited and approved: 79 Maine, 376.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.

ANDREW ALLISON, Ch.

J. M. GAUT and J. S. PILCHER for Bank.

A. N. GRISHAM for Junk Bros.

BEARD, J. This suit was instituted against the Junk Bros. Lumber & Manufacturing Co., a corporation with its situs in Nashville, as the indorser for value of certain domestic negotiable notes. The defendant resisted recovery on the ground that notice of dishonor of the paper was not given as the law requires. A decree having been pronounced against the corporation, it has filed the record in this Court, and the action of the Court below in overruling this defense is assigned as error.

Before coming to the general question raised by the assignments, it is proper to dispose of five of these notes, which are shown by the proof to have been made for the accommodation of this corporation and afterwards indorsed by it to the complainant. As to these notes, their makers stood in the situation of sureties to the indorser, and it was the latter's duty to provide funds to meet them at maturity, and it was, therefore, bound to the holder without presentment, protest, or notice. 2 Am. & Eng. Ency. of Law, 399; 2 Daniel on Nego. Ins., Sec. 1085; 3 Randolph on Com. Paper, Sec. 1205; *Black* v. *Fizer*, 10 Heis., 48. Thus disposing of those five notes, the question recurs as to the liability of the defendant as indorser of the remaining thirty-five.

The facts disclosed in the record are, that, for a

considerable period of time, the Junk Bros. Lumber & Manufacturing Co. were engaged in manufacturing in Nashville, with its business office located at the corner of First and Woodland Streets, in that city. Its books were kept there and there its mail, with that of its principal officers and its various employes, was delivered. On May 28, 1892, the corporation being insolvent, made a general assignment of all its property, both real and personal, to one Stainback, as assignee, for the benefit of all its creditors. This assignment was a full surrender to the assignee, and, by its terms, "vested him with all power and authority to do all acts and things which may be necessary in the premises to the full extent of the trust" created, and it authorized him "to ask, demand, recover and receive of and from all and every person or persons, all property, debts, and demands due, owing, and belonging to" said assignee, and "to give acquittances and discharges for the same, to execute and deliver deeds," and to use the name of the assignor whenever the purpose of the trust required.

Immediately on the execution of the assignment, the assignee took charge of the property covered by it, and went into possession of the office of the corporation, with its books, iron safe, etc., and employed at this office a young man to do such clerical work as was required in the administration of the trust. For a limited time after the day of the appointment, with the old employes of the corpora-

tion, he continued to run its machinery for the purpose of converting its raw material into manufactured goods. In winding up the affairs of this trust, he took into his service, as such assignee, one Spain, who was a stockholder as well as the director and general manager of this corporation at the date of the assignment, and who continued, according to the testimony in the case, to sustain these relations to it after that date. It is true the duties imposed by the assignee upon Spain made it necessary for him to be principally in the yard and about the plant, but the proof is, that he was in this office every day, and sometimes more than once during the day. The mail of the corporation was delivered there as before, and, assuming to be entitled to the control of it, the assignee opened it personally or by his clerk, and gave it such attention as it required, and no officer of the corporation ever called in question his right to control it, although, in the nature of things, all the officers must have known that he was receiving it and so dealing with it.

After the assignment the corporation abandoned business, and all of its executive officers (with the single exception of the general manager) were scattered, and each one pursued his own private affairs at other points in the city of Nashville. After that time it had no other office, and there were but two meetings of the board of directors, and these were held in private offices, and with regard to past and

unimportant transactions. Beginning with the date of the assignment, and for several months thereafter, the paper sued on matured, and payment on proper demand having been refused, it was protested by a Notary Public, and notice of the protest in each instance, save two, was directed by him to the corporation by name, and was left by him at the office heretofore mentioned. In the two excepted cases, or instances, the notices were addressed to "George W. Stainback, Assignee of the Junk Bros. Lumber & Manufacturing Company." In all these cases, as notices were received, the clerk of the assignee entered a memorandum of the protest in the books of the corporation kept by him, and generally deposited these notices in the safe. The officers of the corporation insist that they did not receive these notices. Conceding this to be true, is the defendant bound as indorser under the foregoing facts, nôtwithstanding the lack of actual receipt of these notices?

Where the indorser has failed to receive notice, he is discharged unless the holder can show that he has used due diligence in his effort to communicate notice. Where this can be shown, however, it is immaterial that the notice does not reach the indorser. *Harris* v. *Robinson*, 4 Howard (U. S.), 336. So it is, that legal notice is not necessarily actual notice. *Saco National Bank* v. *Sanborn*, 63 Maine, 340. Thus, an indorser who changes his residence without the knowledge of the holder of

the protested paper, is bound by notice sent to his former place of residence, if the holder is not guilty of negligence in his failure to have knowledge of the change. In such a case the holder, in the absence of any fact to put him on inquiry, can well assume that the indorser's residence continues where it formerly was. He is not bound to go upon the street to ascertain a fact which he has the right to assume he already knows. *Saco National Bank* v. *Sanborn, supra; Bank of Utica* v. *Phillips*, 3 Wend., 408; *Requa* v. *Collins*, 51 N. Y., 148; 2 Daniel on Neg. Insts., Sec. 1083; 3 Randolph on Com. Paper, Sec. 1281; *Harris* v. *Memphis Bank*, 4 Hum., 518.

The well-established rule is that, where personal notice is not given, the notice must be sent to the place where the indorser will be most likely to receive it, and, if there is reasonable diligence exercised by the holder in ascertaining this place, this is all the law demands.

The Bank of America v. *Shaw*, 142 Mass., 290 (S. C., 7 N. E. R., 779), is, in many respects, similar to this case, and will serve to illustrate this rule. The facts in that case were that F. Shaw & Co. had done business at 268 Purchase Street, in Boston, and, while so engaged, indorsed the paper in question. Before its maturity, the firm became insolvent, and made a general assignment to one Wyman for the benefit of their creditors. The assignee took possession of the office of the firm, and

used it in the administration of his trust, but he permitted the sign of the firm to remain tacked to the door. At the maturity of the paper, F. Shaw was a fugitive from Massachusetts, and in hiding in Canada. The notice of protest addressed by the Notary to the firm, by its proper name, was left by him at this office. F. Shaw, when subsequently sued on this paper, defended upon the ground that this notice was not sufficient to bind him, but the Court held that it was good, "because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust." It is true that, in the opinion announced, the fact of Shaw being a fugitive at the time of the notice is given its due weight by the Court, but this was not, by any means, controlling in the conclusion reached.

So, in *ex parte Baker*, L. R., 4 Ch. Div., 795, the facts were, that Bellman & Co., who had done business at "Oak Brewery," but were no longer doing so, drew drafts on one Hay, which were dishonored. Before their maturity, Bellman had become bankrupt, and a trustee had been appointed for his estate. Notice of dishonor was directed to the drawers at "Oak Brewery," and, yet, in the absence of proof that the trustee was in possession of the old place of business of the firm, the notice was held to be sufficient.

Again, in *Casco National Bank* v. *Shaw*, 79 Maine, 376 (S. C., 10 At. Rep., 67), upon facts

like those considered in *Bank* v. *Shaw*, *supra*, and in an action against the indorsers, the Court say: "Notices were addressed to them at their former place of business, where their affairs were being settled by a trustee to whom they had made an assignment for the benefit of their creditors, and we have no doubt that the notices were received by the latter. Notices so sent and mailed are sufficient."

It is unnecessary to extend the discussion of this question. It is sufficient to say that, in view of all the facts of this case, as well as in the light of these authorities, we have no hesitation in holding that the corporation is liable as indorser on all this paper, where notices of protest were addressed to it in its corporate name.

But it is insisted, however, that at least the corporation is not liable on the two notes the notices of the protest of which were addressed by the Notary to "G. W. Stainback, assignee of the Junk Bros. Lumber & Manufacturing Company." Whether notice of protest to the trustee of a bankrupt's estate, or to the assignee of an insolvent assignor making a general assignment, is sufficient, has been the subject of uncertainty of opinion with some of the text writers, and of conflict among others.

Mr. Byles, in his work on Bills (Wood's Ed.), p. 294, says: "If the drawer of a bill become bankrupt, notice must, nevertheless, be given to him, whether a trustee be appointed or not." A number of English cases are cited by the author in his note

to this text, some of which support it, and others do not.

Parsons says: "If a person entitled to notice be bankrupt, notice should be given to him, if the assignees are not yet appointed; if they are, notice, perhaps, should be given to them," etc. 1 Parsons on Notes and Bills, 500.

Judge Story says: "If the party entitled to notice be a bankrupt, and assignees have been appointed, and the holder knows it, notice should be given to them." Story on Prom. Notes, Sec. 307.

Mr. Daniel says: "If the party be a bankrupt, it is best to give notice to him and to his assignee also." If, however, "given to the assignee alone, it would probably be sufficient." 2 Daniel, § 1002.

On the other hand, Mr. Chitty says: "If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and, after such choice, to them." Chitty on Bills, p. 228.

The author of the article on Bills and Notes (Mr. Charles Merrill Hough, of the New York bar) in 2 Am. & Eng. Enc. of Law, p. 412, says: "Upon the bankruptcy of an indorser, and before the appointment of an assignee, the bankrupt himself is the proper person to notify, but the assignee, when appointed, should receive all notices of dishonor."

Mr. Tiedeman says: "If the drawer or indorser be bankrupt, notice should be given to the assignee, if there be one, particularly if the party has absconded."

In one of the latest, and, perhaps, the most elaborate, of the treatises on the subject of commercial paper — that of Mr. Randolph — the author says: "After the drawer or indorser of a bill has become bankrupt, notice of its dishonor must be given to him or to his assignee; * * * if an assignee has been appointed, and his appointment is known, the notice should be given to him." 3 Randolph, Sec. 1243.

Mr. Wade, in his work on "Notice," says: "When the indorser or drawer becomes bankrupt subsequent to drawing or indorsing the bill or note, the notice should be given to the assignee, when one has been selected prior to the dishonor of the instrument."

This question seems to have been considered and determined in only three of the American Courts. The Supreme Court of Kentucky, in *Callahan* v. *Bank*, *supra*, in the case of a voluntary general assignment for the benefit of creditors, after a full and careful consideration of the authorities, announced as the law of that State, that notice to the assignee, in such an assignment, would bind the indorser and his estate, and this upon the ground that, by this act of the assignor, he was, under the assignor, in a qualified sense at least, the general representative of his indebtedness.

On the other hand, the Supreme Court of Ohio, in *House* v. *Vinton*, 43 Ohio St. R., 346, by a majority opinion, declined to recognize the authority

of this case, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. In this latter case, however, there is a strong dissenting opinion by two of the Judges of that Court, in which the soundness of the rule, as announced by the Kentucky Court, is earnestly insisted upon.

The case of *Casco National Bank* v. *Shaw*, 79 Maine, 376, is in harmony with the rule in *Callahan* v. *Bank*, *supra*, although the latter case is not mentioned in the opinion of the Court.

This question has been heretofore undetermined in this State, and we are at liberty, therefore, to establish that rule which is most in accord with what we conceive to be the weight of authority and reason. We are satisfied, therefore, to hold the law to be that, whenever a general assignment is made, as contemplated by our law, that the assignee in such assignment so far stands in the shoes of his assignor that notice to such assignee of the nonpayment of indorsed paper will bind such indorser.

The judgment of the Court below is affirmed.

CASES

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ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

WESTERN DIVISION.

JACKSON, APRIL TERM, 1895.

INSURANCE CO. *v.* LAUDERDALE.

(*Jackson.* April 11, 1895.)

LIFE AND ACCIDENT INSURANCE. *Misstatement in application.*

If assured falsely states, in his application for a life and accident policy, that his "habits are correct and temperate," and the truth of that statement is warranted and made the basis of the contract of insurance, and a conditon precedent to the validity of the policy, the policy is void, and it is not essential, in

such case. "that the misstatement must be willful and intentionally made and known at the time to be false."

Case cited and approved: Boyd v. Insurance Co., 90 Tenn., 215; 6 Fed. Rep., 672; 90 Pa. St., 118.

FROM TIPTON.

Appeal in error from Circuit Court of Tipton County. THOS. J. FLIPPIN, J.

C. B. SIMONTON and J. C. BOALES for Insurance Company.

G. W. SMITHEAL, N. W. BAPTIST, and PEYTON J. SMITH for Lauderdale.

McALISTER, J. This is a suit upon a policy of accident insurance issued by the plaintiff in error upon the life of Munford Lauderdale, and made payable, in the event of his death, to his wife, Mrs. Jessie Lauderdale. The indemnity provided by the contract of insurance was against injuries happening to the insured from external, violent, and accidental means, which, in case of temporary disability or permanent misadventure, was to be apportioned according to a graduated scale; but, in the event such injuries resulted in death, the whole principal of $2,000 became payable.

The said Munford Lauderdale resided in Covington, and, on the night of March 21, 1893, during the absence of the other members of the family,

the residence caught fire, and, in the conflagration, the said Munford was burned to death.

The policy of insurance recites that it is issued in consideration of the warranties in the application, etc. The application, which was signed by the said Munford Lauderdale, stipulates that the statement of facts therein made are warranted to be true, and, if found untrue in any respect, the policy shall be void. It further recites that the application and warranty shall constitute the basis of the contract between the insured and the company. Among other statements made in said application, it recites that applicant's habits of life are correct and temperate. The policy itself provides that it shall not cover any injury happening to the insured when intoxicated, or in consequence of his being or having been under the influence of any narcotic or any intoxicating drink whatsoever. It is further stipulated in the policy that the injury must be produced by external, violent, and accidental means, independently of all other causes.

The insurance company resisted any liability in this case upon three grounds, to wit:

First.—That the said Munford Lauderdale falsely represented in his application that his habits of life were correct and temperate.

Second.—That the fatal injury happened to the insured when he was intoxicated, and this fact exempts the company from liability under the express stipulations of the policy.

Third.—That the death of the insured occurred in consequence of his being, or having been, under the influence of intoxicating drink, which fact, under the conditions of the policy, exonerates the company from liability.,

It appears from the record that the said Lauderdale, at the time of the accident, was in the employment of C. O. & S. W. R. R. Co. as repairer of its telegraph line. He had spent the day in Memphis, returning to Covington about seven o'clock in the evening. There was evidence tending to show that deceased spent most of that evening in several saloons of the town of Covington, and imbibed to such an extent that the barkeepers, seeing his condition, declined to sell him more liquor. At a late hour he was persuaded by one Campbell to go home, the latter accompanying him. Reaching home, Lauderdale unchained a favorite bull dog, which followed him to his bedroom. Campbell states that he then played on the violin for the amusement of Lauderdale and the dog. This witness testified that he considered Lauderdale, on the night of March 20, 1892, under the influence of whisky to some extent, but not drunk, or unable to take care of himself; that deceased would not let witness take hold of his arm when they were going home, for fear someone would say he (Lauderdale) was drunk. Witness went home with Lauderdale at the request of Carey Hill, Lauderdale's brother-in-law. At first Lauderdale refused to go, but afterwards consented to go.

Lauderdale asked witness to get him some whisky, as he might need it next morning. Witness got a pint of cocktail of Don H. Smith for Lauderdale. While witness and Lauderdale were at the house, witness told Lauderdale he did not get any whisky for him, but Lauderdale afterwards found the bottle on the mantelboard, and, as witness was about leaving, Lauderdale took a mouthful from the bottle, but spit it out and said he did not like it. Lauderdale started to go back to town when witness left, but when witness told him most people had gone to bed, he went back up the steps. Campbell left the house about twelve o'clock, leaving Lauderdale alone with his dog. A coal oil lamp, which had been lighted by Campbell and placed on a table, was still burning. Sometime between twelve and one o'clock the house was discovered to be on fire. A witness who reached the fire early, saw a person in the room he took to be Lauderdale. The body was lying on the floor with the face downwards. The fire was then all through the room. The next morning the remains were found charred and indistinguishable. A pair of iron pliers, which Lauderdale always carried, were found near the remains; also a key ring, a rim of a pocketbook, pants buttons, and two buckles. The remains of the dog were found within five or six feet of the body. It was by these means that the body of Lauderdale was identified.

There was a verdict and judgment in favor of

the plaintiff below for $2,133. The insurance company appealed, and has assigned errors. The first assignment is based upon the concluding portion of the following instruction to the jury:

On the question of warranties in the insured's application for the policy, His Honor charged as follows: "It is now claimed that the statement subscribed by the deceased, Munford Lauderdale, to the effect that his habits of life were correct and temperate, was untrue, and, by the express terms of the policy, render it null and void. In other words, it is claimed that his habit as to drinking was not temperate; that he was at that time, and prior thereto, addicted to drinking to excess, and in this particular his habit of life was not temperate. Now, if you find from the proof that, when this statement was made and this policy was issued, that statement in the application was not true, and the habits of said Lauderdale were not temperate, in the particular indicated, that would avoid the policy, and the plaintiff could not recover; but, to have this effect, the misstatement must be willful and intentionally made, and known at the time to be false."

So much of the above charge as follows the word "but," and to the end of the sentence, is assigned as error, to wit: "That the misstatement must be willful and intentionally made, and known at the time to be false."

We are of opinion this instruction was manifestly erroneous.

In the application referred to is the following statement: "I hereby apply for insurance against bodily injuries caused solely by violent, external, and accidental means, to be based upon the following statement of facts, all of which I hereby warrant to be true. If found to be untrue in any respect, then, in every such case the policy issued hereon shall be null and void."

Following the above, at division 11, letter *a*, is the following: "My habits of life are correct and temperate."

The closing paragraph of said application is in the words following: "I hereby agree that this application and warranty, together with all the premium paid [by] me, shall be the basis of the contract between the company and me, and I accept the policy which said company shall issue on this application, subject to all the conditions, provisions, and classifications contained in such policy or referred to therein, which I understand cannot be altered, changed, or waived by any agent of said company, either before or after the issuance thereof," and the same was signed by the insured, Munford Lauderdale.

"The substance of the decisions relating to the subject of warranty in insurance contracts is that the truth of all statements warranted to be true is a condition precedent to the liability of the insurer; for if the statements so warranted are untrue, there is no contract. Where the policy recites that the statements made in the application are warranted to

be true and are the basis of the contract, and that any misstatements in the application should make the policy void, the answers in the application are warranties.'' Bacon's Life Insurance, Sec. 194.

Says Mr. May, in his work on Insurance, viz.: "No particular form of words is necessary to constitute a warranty. Any statement or stipulation upon the literal truth or fulfillment of which in the intention of the parties the validity of the contract is made to depend, * * * amounts to a warranty. But no particular form of words will make a statement or stipulation a warranty, not even the use of the word 'warranty,' where it is apparent, from the context or from the other parts of the contract, that it is not the intention of the parties to make the validity of the contract depend on the literal truth or fulfillment of the statement or stipulation.'' May, Sec. 156.

We are of opinion that the statements made by the assured in his application for the policy, in respect to his habits, were not mere representations, but absolute warranties. Those statements were made in respect to a material matter that vitally affected the contract, and, if untrue, invalidated the whole insurance, whether the misstatement was willful and intentional or made through inadvertence. Indeed, in this view of the case, it is immaterial whether such statements be called representations or warranties. As stated by this Court in *Boyd* v. *Insurance Co.*, 90 Tenn., 215, "if, however, the rep-

resentation be of a fact material to the risk, and be relied upon by the insurer, it is the undoubted general rule that such representation, whether made intentionally or through mistake and in good faith, avoids the policy.'' The materiality of the applicant's statement in respect to his habits on the subject of temperance will not be controverted. Applications for life and accident insurance invariably contain questions bearing upon the habits of the applicant, especially in regard to the use of intoxicants. The use of intoxicating liquors and drunkenness are pernicious habits, tending to shorten life, and for this reason such risks are avoided by well-regulated life insurance associations. *Schultz* v. *Mutual Life Insurance Co.*, 6 Fed. Rep., 672; 90 Pa. St., 118. Accident insurance companies also avoid such risks, for the reason that such indulgences render the assured incapable of discerning danger, and especially incapacitate him for avoiding its consequences after it is discovered. The statement, therefore, of the applicant in this case that his habits were correct and temperate, was most material to the risk, whether it be called a representation or a warranty, and, if untrue, it avoided the policy. It was, therefore, erroneous for the Court to charge ''that, to have this effect, the misstatement must be willful and intentionally made, and known at the time to be false.''

The judgment is reversed and the cause remanded for a new trial.

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MEMPHIS *v.* BING.

(*Jackson.* April 16, 1895.)

1. STATUTES. *Imposing taxes, how construed.*

It is a general rule that, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government and in favor of the citizen or subject, because burdens are not to be imposed beyond what the statutes expressly and clearly import. (*Post, pp. 648, 649.*)

Cases cited and approved: 2 Story, 369; 5 Blatch., 202; 9 Pick., 412.

2. SAME. *Same. Case in judgment.*

Hence, a statute that imposes specific taxes for municipal purposes upon certain enumerated privileges, and, upon all other privileges not therein enumerated, a tax equal to that imposed for State purposes, does not embrace or operate to tax for municipal purposes a privilege created and taxed for State purposes subsequently to the passage of such statute. (*Post, pp. 645–648, 649.*)

Acts construed: Acts 1893, Ch. 89, § 4; Acts 1879, Ch. 11.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

METCALF & WALKER for Memphis.

JOHN T. MOSS and J. P. EDMONDSON for Bing.

McALISTER, J. This is a proceeding by the city of Memphis against the defendant, Bing, and twenty other Chinamen, to enforce against each defendant the payment of a license tax for the privilege of conducting a public laundry in the city. The Circuit Judge, who heard the case without a jury, was of opinion the defendants were not liable for the tax, and pronounced judgment in their favor. The city appealed. It bases its right to collect this tax upon the general revenue. Act of 1893, Ch. 89, Sec. 4, p. 115, which declares that public laundries, other than steam, shall pay, each, per annum, $15.

The insistence is, that the Legislature, by this act, declared this business a taxable privilege, not only for the benefit of the State, but likewise for the benefit of the taxing district. This act was approved April 10, 1893, and, up to that date, the business of hand laundries had never been declared a taxable privilege. A few days prior to the passage of this act, to wit: on April 5, 1893, the Legislature passed an act restoring to the city of Memphis the power to levy taxes on property and privileges. Prior to this date, the General Assembly of the State assessed taxes on property and privileges for the city of Memphis, which was then known as the taxing district. By the Act of 1893, the city was rehabilitated with corporate autonomy,

and authorized to exercise the taxing power, as an arm of the State government. The city was thus clothed with the power to levy a tax for municipal purposes upon all occupations and vocations declared to be privileges by the laws of the State. The Act of April 10, 1893, declared the business of public hand laundries to be a privilege, and levied a tax thereon of $15 for State purposes. The city of Memphis, however, has not, by ordinance or other corporate act, laid any tax upon this occupation for municipal purposes.

An ingenious argument, however, has been submitted by counsel for the city to show that such legislation on the part of the city was unnecessary, for the reason that the Legislature had already laid a tax upon this business for the benefit of the taxing district, and that when the Act of April 5, 1893, was passed restoring the taxing power to the city, it was expressly provided "that all laws imposing privilege taxes for said municipality shall remain in force until changed by the State or by such municipality under the authority here delegated."

It will be remembered that, under the Act of 1879, all taxes on privileges and property were levied for the municipality directly by the State. This statute enumerated a catalogue of privileges, and taxed them all for municipal purposes. This Act further provided "that there is hereby assessed on all privileges not herein specifically enumerated, a tax equal to the tax assessed for State purposes,

the same to be collected as other privileges are collected." This Act was amended by the Act of 1881 fixing the minimum tax on such privileges at ten dollars. When this legislation was enacted, in 1879 and 1881, the State had not declared the business of a public hand laundry to be a taxable privilege, and no such legislation was enacted until April 10, 1893, or more than twelve years thereafter. The determinative question then is, whether the Act of 1879, assessing a tax on all privileges not therein specifically enumerated, fixes a tax upon a privilege not then created, and not brought into existence until more than twelve years thereafter.

It would seem that the mere statement of this proposition would import its own refutation, especially since it appears that, in the meantime, the power of taxation has been restored to the city, and it has not chosen to tax this occupation as a municipal privilege. It is admitted by counsel for the city that, under its rigid literalism, the Act of 1879 only embraced the State privileges then created and taxed. It will be observed that the Act of 1879 provides for a municipal privilege tax equal to the tax assessed for State purposes. The word assessed is in the past tense, and refers to taxes already assessed on privileges, and cannot be held to have a prospective application to privileges thereafter created. The force of this construction is admitted by counsel for the city, but his insistence is "that the spirit and intent of the Act was that

any privilege not specifically enumerated, but which, by subsequent Acts of the Legislature, might be declared and assessed as a privilege for the State, should be likewise assessed in the same amount for the city." We cannot think this tax is within either the letter or the spirit of the law.

It is true, as stated by Mr. Cooley in his work on Taxation, page 198, "that the underlying principle of all construction is that which seeks the intent of the Legislature in the words employed to express it. Beyond the words we are not to look, where the meaning is plain and intelligible." The same author quotes with approval the following language from Dwarris on Statutes, pp. 742–749, viz.: "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that, when the public are to be charged with a burden, the intention of the Legislature to impose the burden must be explicitly and distinctly shown."

Mr. Justice Story, in giving reasons for holding that the revenue act of 1841 did not intend to levy a certain permanent duty on indigo, said: "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule that in the in-

terpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government and in favor of the citizen or subject, because burdens are not to be imposed beyond what the statutes expressly and clearly import." See *United States* v. *Wigglesworth*, 2 Story, 369.

Said Mr. Justice Nelson: "Duties are never imposed upon the citizen upon vague or doubtful interpretations." *Powers* v. *Barney*, 5 Blatch., 202.

Statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be strictly construed. Parker, Ch. J., in *Sewell* v. *Jones*, 9 Pick., 412.

Parsons in his treatise on Contracts, Vol. III., page 287, states the rule thus: "It is a well-settled principle that every charge upon the subject must be imposed by clear and unambiguous words. * * * But it is equally certain that no interpretation will be adopted which must defeat the purpose of the law, provided the language of the statute admit, fairly and rationally, of an interpretation which sustains that purpose."

The plain import of the language employed in the Act of 1879 is, that all privileges not therein

specifically enumerated, but already created and assessed for State purposes shall likewise be liable for municipal privilege taxes. The business of hand laundries was not then a taxable privilege, and the Act of 1879 had no such expansive quality as could be made to reach out and bring within its grasp a privilege which was not brought into existence until twelve years afterwards. This would indeed be a farfetched construction, which we hold to be entirely unwarranted by the language of the Act.

Affirmed.

MILLS *v.* BENNETT.

(*Jackson.* April 18, 1895.)

1. EXEMPTIONS. *Waiver of.*

A person contracting a debt cannot, by a contemporaneous and simple waiver of benefit of the exemption laws, confer upon his creditor the right, upon obtaining judgment for his debt, to levy his execution, over the debtor's objection, upon exempt property. Such agreement is contrary to public policy and void. (*Post, pp. 651–657.*)

Cases cited and approved: 10 Bush, 156 (S. C., 19 Am. Rep., 61); 82 Ill., 147 (S. C., 25 Am. Rep., 301); 22 N. Y., 240 (S. C., 78 Am. Dec., 186); 20 Iowa, 376; 15 La. An., 245; 20 Fla., 558 (S. C., 51 Am. Rep., 618); 8 How. Pr., 547.

Cited and distinguished: Denny *v.* White, 2 Cold., 283; Cox *v.* Ballentine, 1 Bax., 362; Cronan *v.* Honor, 10 Heis., 534; 60 Ala., 313.

2. SAME. *Same.*

And such waiver is equally ineffectual whether made by the head of a family or by a single person entitled to exemptions (*Post, p. 657.*)

FROM SHELBY.

Appeal in error from Second Circuit Court of Shelby County. J. S. GALLOWAY, J.

B. F. BOOTH for Mills.

M. D. FLEMING for Bennett.

MCALISTER, J. The only question presented for determination in this cause is whether a debtor may

waive his exemptions for the benefit of his creditor. The stipulation for a waiver of exemptions was incorporated in the following note, viz.:

"MEMPHIS, TENN., August 23, 1894.

"Thirty days after date I promise to pay to the order of G. M. Anderson five dollars. I do hereby agree to waive my rights to exemption under the laws of the State of Tennessee until the bill is paid in full. Value received. H. H. BENNETT."

"Witness: J. M. SIMMS,

"WM. H. MILLS."

Indorsed: "I do hereby transfer the within note to W. H. Mills. G. M. ANDERSON."

The defendant, Bennett, is a daily laborer in the employment of Stewart, Gwynne & Co., a mercantile firm in the city of Memphis. The creditor is seeking, by these proceedings, to subject to the payment of his judgment wages due Bennett, which are exempt by law from execution, seizure, or attachment. Code, § 2931.

It appears from the record that Bennett is the head of a family, with a wife and three children. This consideration, however, is immaterial, since it is not necessary, in order to entitle the defendant to this particular exemption, that he should have been the head of a family. Of course this fact only emphasizes the necessity for such exemption, but it is not material as a matter of law. There are other exemptions which are dependent upon this con-

dition, and the validity of contracts entered into by the head of the family is considered from this point of view. It will be observed that the defendant in this case, upon the face of the note, waives all his exemptions—those secured to him as the head of a family and those which he is entitled to independently of the family. Is such a contract valid and enforcible? It was held in the case of *Denny* v. *White*, 2 Cold., 283, "that the property exempt from execution in the possession of the head of a family is held by him for the use and benefit of the family; and while he has the right to sell or exchange such property, it cannot be levied on and sold on execution by his consent, this being a privilege he cannot waive." Said the Court, viz.: "The language of the Act is imperative. The property exempt shall not be liable to seizure and sale by execution, and the head of the family cannot waive the right, as those dependent on him are under the protection of the law, and secured in the enjoyment of the property."

In the case of *Cox* v. *Ballentine*, 1 Bax., 362, it was held that "the head of the family has the right to sell, exchange or mortgage the exempt property, and the Legislature has no power to prohibit him." See, also, *Cronan* v. *Honor*, 10 Heis., 534. It is suggested that these cases are somewhat contradictory and perhaps irreconcilable. The conflict, we think, is more apparent than real.

"There is an essential difference," says the Su-

preme Court of Kentucky, "between an executed contract, by which the owner is divested of title, and an executory agreement, by which the debtor merely promises that, in the future, he will not take advantage of or claim the benefit of a particular statute. * * * The law, in its wisdom, for the protection of the poor and needy, has said that certain property shall not be liable for debt, not so much to relieve the debtor as to protect his family against such improvident acts on his part as would reduce them to want. * * * If such a contract is upheld, the exemption laws of the State would be virtually obsolete and the destitute deprived of all claim they have to its beneficent provisions." *Moxley* v. *Ragan*, 10 Bush, 156 (S. C., 19 Am. Rep., 61).

Says the Supreme Court of Illinois: "That such a waiver, where the same is attempted to be made by an executory contract, is ineffectual and will not be enforced, is definitely settled. * * * Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he choose, sell or otherwise dispose of any property he may have, however much his family may need it, but the law will not aid in that regard, nor permit him to contract, in advance, that his creditors may use the process of the Courts to deprive his family of its use and benefit, when an exemption has been created in their favor. Laws enacted from considerations of public concern and to subserve the general welfare, cannot be abrogated by mere pri-

vate agreement." *Recht* v. *Kelly*, 82 Ill., 147 (S. C., 25 Am. Rep., 301).

Says Judge Denio: "The maxim, '*modus et conventio vincunt legem*,' is not of universal application. It applies only to agreements in themselves legal. Where no rule of law or principle of public policy is concerned, the parties may, by contract, make a law for themselves. One object of municipal law is to promote the general welfare of society. The exemption laws seek to accomplish this by taking from the head of the family the power to deprive it of certain property by contracting debts which shall enable the creditors to take such property on execution." The parties to this contract sought to set aside those laws so far as this debt was concerned. This they could not do. The learned Judge says: "I am of opinion that a person contracting a debt cannot agree with the creditor that, in case of non-payment, he shall be entitled to levy his execution upon property exempt from execution by the general laws of the State. * * * If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and, in that way, the policy of the law will be completely overthrown. Every honest man who contracts a debt, expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case

of nonpayment. It was against the consequences of this overconfidence and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the Legislature has undertaken to interpose. When a man's last cow is taken on an execution on a judgment rendered upon one of these notes, it is not sufficient to say that it was done pursuant to his consent, freely given when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent. The statutes contain many examples of legislation based upon the same motives. The laws against usury, those which forbid imprisonment for debt, and those which allow a redemption after the sale of land on execution, are of this class." *Kneettle* v. *Newcomb*, 22 N. Y., 240 (S. C., 78 Am. Dec., 186).

The Supreme Court of Iowa, after a full consideration of the subject, said, viz.: "Without pursuing the discussion of the subject further, we are agreed in the conclusion that a person contracting a debt cannot, by a contemporaneous and simple waiver of benefit of the exemption laws, entitle the creditor, in case of failure to pay, to levy his execution, against the defendant's objection, upon exempt property. Such an agreement is contrary to public policy, and will not be enforced. *Curtis* v. *O'Brien*, 20 Iowa, 376.

In the case of *Branch* v. *Tomlinson*, 77 N. C., 388, a similar waiver, incorporated in a promissory

note, was attempted to be enforced. The Court said: "The agreement is to waive a right in contravention of State policy, which agreement this Court cannot undertake to enforce."

In *Levicks* v. *Walker*, 15 La. An., 245, a similar conclusion was reached.

The Supreme Court of Florida, in *Carter* v. *Carter*, 20 Florida, 558 (S. C., 51 Am. Rep., 618), in a most able and elaborate opinion, held, viz.: "In view of the recognized policy of the States in enacting exemption laws, and of the practically universal concurrence of the authorities on the identical question, our conclusion is that the waiver of the benefit and protection of the exemption laws contained in this note is not valid to defeat a claim of exemption." See, also, *Crawford* v. *Lockwood*, 8 How. Pr., 547.

The result of our examination is that the main current of judicial enunciation is against the validity of such contracts. Possibly the only Court out of line is that of Pennsylvania. Such contracts are also sustained in Alabama, but under the authority of an express statute. *Brown* v. *Leitch*, 60 Ala., 313. We think the weight of reason as well as authority is opposed to such stipulations. In our view, it is immaterial whether the contract is made by a single man or the head of a family. In either case it contravenes a sound public policy, and, if enforced, abrogates the exemption statutes.

The judgment is affirmed.

SHACKT *v.* RAILROAD.

(*Jackson.* April 18, 1895.)

COMMON CARRIER. *Released from liability by consignor's act.*

A common carrier is released from liability for loss of goods, where, without fault or negligence on his part, the carrier is induced, by the acts and conduct of the consignor, whether intentional or otherwise, to believe that the goods were of a nature and value different from the truth, whereby freight charges thereon were diminished, and the carrier's risk increased, while his care and vigilance were relaxed. The facts stated in the opinion afford an illustration of this proposition.

Cases cited and approved: 148 U. S., 627; 18 Am. & Eng. R. Cases; 1 Bissell, 35.

FROM SHELBY.

Appeal from Second Circuit Court of Shelby County. J. S. GALLOWAY, J.

FRANK ZIMMERMAN for Shackt.

ESTES & FENTRESS for Railroad.

WILKES, J. This action was instituted before a Justice of the Peace, in Shelby County, to recover from the defendant railroad company the value of a hamper basket and its contents, shipped over the road by the plaintiff from Chicago to Memphis.

There was judgment before the Justice of the Peace for $156.50 and costs, from which the railroad company appealed to the Second Circuit Court of Shelby County, where the case was tried before the Judge without a jury, and judgment was rendered for the defendant railroad company, and plaintiff has appealed to this Court, and assigned errors.

Plaintiff is a native of Hamburg, Germany. He left that city in 1881, and went to the Argentine Republic, where he remained until 1890; thence to Brazil, where he stayed six months; thence to Chicago in 1891, and thence to Memphis in 1893.

He was married in 1892, in Chicago, his wife having been, before and since her marriage, a dressmaker and milliner for a number of years.

When about to leave Chicago for Memphis, on December 12, 1893, the plaintiff delivered for shipment, to the agent of the Illinois Central Railroad Company, a lot of freight to be shipped to Memphis, consisting of four boxes, two trunks, three barrels, one sewing machine, one table, one bundle, table leaves, two bundles of toy chairs, two bundles of bedding, one basket and contents, and a number of other small articles.

Plaintiff carried these goods to the depot, accompanying the express driver, and his statement is, that, the day being bitterly cold, all were eager to be relieved as soon as practicable. The agent of the railroad company, seeing the lot of articles to be shipped, cried out to his assistant "household goods,"

and plaintiff standing by heard this but said nothing, but explains in his testimony that he had never previously shipped any goods by freight, and did not know there were different rates of charges, depending on different classifications of freight. He inquired the amount of the freight bill, but was told he could pay it at Memphis, and he made no reply and said no more.

The goods were placed in a freight car, and it was sealed, and so remained until it reached its destination, when, upon opening the car and delivering the remainder of the goods, it was ascertained that the basket and contents were missing, and they have never been found or delivered, though search has been made for them by the railroad company.

The goods were billed at 1,700 pounds, and the freight rate charged was 43 cents per hundred, being what is known as a fourth class freight rate. Upon the bill was written the words, "Owner's risk; rel. to value, $5." Plaintiff testifies that he did not know the meaning of these words, that they were not explained to him, and he could not ascertain, though he inquired of several persons, but the best impression he could get was that if the goods were lost he would receive $500.

The words are shown to mean that the goods are shipped at the risk of the owner, and the railroad company released of all liability beyond $5 per 100 pounds.

The freight rate charged, 43 cents per 100

pounds, was the usual rate charged for household goods, and the railroad employes state that they were received and shipped as such household goods. This basket is described as being about five feet long and two and one-half feet wide, there being two of them lashed together with a rope or clothes line. No one except the wife of the plaintiff testifies as to the contents of the basket; but she states that it contained the following articles: A blue suit of men's clothes, $25; set tablecloth and napkins, $9; linen tablecloth, $1.75; one linen tablecloth, $1.35; one half dozen solid silver tablespoons, marked "A. S.," $15; two dozen linen towels, $12; seven yards black basket cloth, $4.20; ten yards figured cotton cloth, $1.25; three yards red plush, $4.50; three yards gray Ottoman silk, $3.75; two yards red satin, $1.50; three and one half yards blue velvet, $5.25; ten yards black silk grenadine, $10; seven yards Henrietta cloth, $8.75; five yards brown flannel, $3.25; box tidies, ribbons, and notions, $4; two vases, $8; black skirt, with ruffle, $3.50; bed spread, $1.25; two pictures and frames, $4; three silk scarfs, $3.50; chenille table spread, $7.50; two pair lace curtains, $7; seven roll styles pictures, $5.25; one pair pillow shams, $2.50; one rubber wrapper, $3.50. Total, $156.50.

It appears from the statement of Mrs. Shackt that these articles were, in the main, goods to be sold by her in her business. The pictures were of

members of the family, and the spoons a gift from her mother.

It is insisted by plaintiff that there was no intentional fraud upon his part in shipping these goods, and that he did not know the rates of charges depended on the classification of the freight or character of the goods shipped, and that the Circuit Judge was in error in denying him a judgment for the value of the goods.

Plaintiff's counsel assents to the proposition of law that, when the value of the goods is deliberately and intentionally concealed by the shipper for the purpose of cheating the carrier out of his reasonable hire, the carrier would not be liable in case of loss, and the shipper could have no relief. But it is insisted that, in this case, the shipper was inexperienced; had never shipped anything in his life, and did not know the rules of railroad companies in fixing rates and classing freights, and, hence, was not guilty of intentionally defrauding or attempting to defraud the railroad company.

We are unable, from the facts disclosed in this record, to regard the conduct of plaintiff in the light in which counsel places it. Plaintiff was a man of intelligence, about 35 years of age, who had traveled much: a machinist by trade. His wife had also engaged in business, and it is hardly credible that these two persons should have been so ignorant in regard to shipment of goods as they profess to have been. Indeed, the circumstances of the ship-

ment tend more strongly to establish a case of premeditated imposition on the railroad company than one of simple ignorance and innocence. The shipment of silks, satins, laces, curtains, silver spoons, and other articles of value in a basket, with a rope around it, and without making known its contents, is not satisfactorily explained upon the ground of ignorance. They had two trunks in the same shipment, both with locks; and, while the proof does not disclose in detail what they contained, we cannot presume their contents were so valuable as the contents of this basket, without heightening the fraud in the transaction, and no good reason is given why these valuables were not placed in the trunks, except as to the pictures, that were too large for that disposition to be made of them.

We can but regard the action of the plaintiff in standing by and assenting to the statement that they were household goods, as well as the manner in which they were shipped and packed, as a constructive if not actual fraud upon the railroad company to obtain cheaper rates of freight than could otherwise be had. Some of the articles, especially the silver spoons, would not have been shipped as freight by the defendant company on any terms, and none of the shipment was, strictly speaking, "household goods," except a few articles, the silks and other goods being in piece, never having been used, and upon these the rate would have been, if shipped at all, as high as $1.70 per 100, instead of 43 cents,

as charged. It is true this rate was not fixed when the goods were delivered at Chicago, but it was so fixed afterward and assented to by the plaintiff when he received the goods at Memphis.

The case of *Humphreys* v. *Perry*, 148 U. S. Sup. Court, 627, is a well-considered one, and lays down, in emphatic language, the nonliability of the carrier of baggage under similar facts. In that case, a traveling salesman for a jewelry firm bought a passenger ticket for passage on a railroad, and presented a trunk to be checked to the place of destination without informing the agent of the company that the trunk contained jewelry, which it did, and without being inquired of by the agent as to what it did contain. He paid a charge for overweight as personal baggage; and the trunk was checked. It was of a dark brown color, and of a kind known as jewelry trunks. It had been a practice of the jewelry company to send out trunks filled with goods, the trunks being of similar character to the one in question, and, as a rule, they were checked as personal baggage. But there was no evidence to show that the railroad company or their agents knew what the trunks contained. Now, that was a much stronger case than the one at bar, because in that case the articles were checked as personal baggage, and yet the Supreme Court held:

1. There was no evidence showing, or tending to show, that the agent of the railroad company had any actual knowledge of the contents of the trunk.

2. That there was no evidence from which it could fairly be said that the agent had reason to believe that the trunk contained jewelry.

3. The agent was not required to inquire as to the contents of the trunk so presented as personal baggage; and,

4. The company was not liable for the loss of the contents of the trunk.

This is an important case, and reviews many cases on the subject; and, coming from the highest Court, is strongly persuasive.

In Am. & Eng. Ency. of Law, Vol. II., p. 795–6, are given many instances of the concealment of the nature and value of the articles shipped, which have been held to release the carrier from liability.

In *Railroad Co.* v. *York*, 18 Am. & Eng. R. R. cases, it was held, that when goods were shipped as freight, the shipper must use no artifice or fraud to deceive the carrier, whereby his risk is increased, or his care and vigilance lessened. If there be such fraud or concealment the carrier is relieved from liability. If money be placed in a trunk without communicating the fact to the carrier, and shipped as freight, the shipper is guilty of fraud.

In Hutchinson on Carriers, Secs. 213, 214, it is said: "Fraud may be as effectually practiced on the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of its contents, if there be anything in its form, dimensions,

or outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled; for, by such deception, the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value.

"And if, under such circumstances, money or other valuables concealed in a package be lost by his negligence or carelessness, it would be unjust to charge him with their full value, because such concealment would be a fraud upon him as respects his compensation for their carriage, and a deception as to the degree of care which the package required, and with which he would have guarded it had he been told the truth—as, where money or jewels, or other articles of great value, are put into a valise or box which is generally used to contain things of small value, and delivery made to the carrier without informing him of the contents, there being nothing in the appearance of the valise to indicate or apprise the carrier that it was of more than ordinary value, it would be an imposition upon him,

and the law would not lend its aid, in such a case, to make him accountable for the money or other valuable contents if they should be lost."

In the case of *Keeter* v. *The Michigan Central Railroad Co.*, 1 Bissell, 35, Judge Drummond charged the jury, that if a railroad company know that immigrants, like the plaintiff, were in the habit of putting valuable articles and money among their household goods, and from such knowledge might have inferred that plaintiff's box might contain money, then it became the duty of the company to make inquiry in order to relieve itself from liability. The Supreme Court of the United States, commenting on this case, said: "We do not think such view is sound." *Humphreys* v. *Perry*, 148 U. S., 646.

We see no error in the record, and affirm the judgment of the Court below, with costs.

STRAIN *v.* HEFLEY.

(*Jackson.* April 20, 1895.)

JUSTICES OF THE PEACE. *Jurisdiction of.*

A Justice of the Peace, elected for one civil district of his county, and having his residence there at the time of his election, and continuously thereafter, with an office in that district, where he holds Court regularly on one day of each week to try such causes as are then brought before him, may lawfully open another office in another civil district of his county, and there issue writs, try causes, and deliver judgments on such days of the week as he is not engaged officially in his own district.

Constitution construed: Constitution 1834, Art. VI., Sec. 15; Constitution 1870, Art. VI., Sec. 15.

Code construed: §§ 4888, 4902; 4903 (M. & V.); §§ 4113, 4127, 4128 (T. & S.).

Cases cited and approved: Morgan *v.* Coleman, 3 Head, 352; Cheatham *v.* Brien, 3 Head, 552.

Question reserved: Whether a Justice of the Peace does not vacate his office when he practically abandons the office he is required to keep in his own district for an office that he opens in another district.

FROM SHELBY.

Appeal in error from Second Circuit Court of Shelby County. J. S. GALLOWAY, J.

THOS. H. JACKSON for Strain.

L. & E. LEHMAN for Hefley.

BEARD, J. This suit was instituted in a Magistrate's Court. There the defendant in error filed a plea in abatement to the jurisdiction of the Justice issuing the warrant or summons and then sitting for the trial of the cause. The plea was overruled, and, after judgment against him on the merits, an appeal was taken to the Circuit Court, where the judgment of the Justice was in all respects affirmed. The case has been brought to this Court, and presents this single question: Can a Justice of the Peace, elected for one civil district of his county, and having his residence there at the time of his election, and continuously thereafter, with an office in that district, where he holds Court regularly on one day of each week to try such causes as are there brought before him, legally open another office in another civil district of his county, and there issue writs, try causes, and deliver judgments on such days of the week as he is not engaged officially in his own district?

The Constitution of 1834, in Section 15 of Article 6, provided that "the different counties in this State shall be laid off, as the General Assembly may direct, into districts of convenient size," and that "there shall be two Justices of the Peace and one Constable elected in each district," and that "the jurisdiction of said officers shall be coextensive with the county." This provision is also found in the Constitution of 1870, Art. 6, Sec. 15.

In 1835 the Legislature passed an Act limiting the jurisdiction of Justices of the Peace as to

amount, and by the third section thereof provided "that it shall be the duty of every Justice of the Peace to designate some one certain day in every month when he shall attend at his usual place of residence, or at some other convenient place in his district, to hear and determine all matters cognizable before him; *Provided always*, That nothing herein contained shall prevent any Justice of the Peace from trying any cause that may be brought before him at any time or at any place within the county." Nich. & Caruth., 431.

This Act stood unmodified at the time of the adoption of our present Code in 1858. Section 4113 (§ 4888, M. & V.) of this Code is as follows: "The jurisdiction of Justices of the Peace, when not otherwise provided, is geographically coextensive with the county." This provision, with the addition of the word "geographically," is taken from the clause of the Constitution above quoted, and this word seems to have been used with the view of giving emphasis to the remainder of the section. But, not content with this general definition of territorial jurisdiction, and apparently with the purpose of setting at rest all questions as to the duty the Justices owed to the communities of the civil districts in which they resided and had been elected, as well as to the right to exercise jurisdiction outside their respective civil districts, but inside the limits of the county, the compilers of the Code brought forward Section 3 of Chapter 17 of

the Acts of 1835 above set out, and embodied it in §§ 4127 and 4128 (§§ 4902 and 4903, M. & V.), changing, however, the phraseology found in the proviso of the Act in a slight degree, and making § 4128 (§ 4903, M. & V.), into which it is carried, read as follows: "He is authorized, however, to try any cause that may be brought before him at any time and at any place within the county, unless expressly prohibited by some positive provisions of the Code."

The question here presented was considered in *Morgan* v. *Coleman*, 3 Head, 352. That case involved the right of a Justice to accept a confession of judgment and a stay or of this judgment at a place about fourteen miles away from the office where he kept his docket and ordinarily exercised his judicial functions. With regard to this, the Court, speaking through Judge Caruthers, said: "There is a certain place fixed by law for the Courts to transact business, but none for Justices of the Peace, except that it must be at some place within their county. It is said by His Honor in this case, and so argued here, that the office of a Magistrate is his ordinary place of doing business, and where his papers are kept. That may be so in common acceptation, but certainly it is not exclusively so in regard to his powers and the validity of his acts. He can and does perform official binding acts wherever he may be in the county. He is an officer for the whole county, although elected by and lo-

cated in a particular civil district." This case was approved and followed in *Cheatham* v. *Brien*, 3 Head, 552.

It seems to us the meaning of the Legislature is to be found upon the face of these provisions of the law, but if there was doubt as to the general question involved in this cause, it is removed by the opinion of the Court in the case just referred to. One conclusion, therefore, is that, upon the facts presented in the plea in abatement in this record, the Justice of the Peace had jurisdiction of this cause, and the trial Judge was right in so holding. It is proper to observe, however, that the effect of this opinion is to be confined to the facts herein presented and cases involving similar facts, and is not intended to embrace a case where there has been a practical abandonment by a Justice of the office which the law requires him to keep in his own district, or the case of a removal from this district such as is contemplated by the statute.

An argument against this conclusion, rested on the ground of public policy, has been earnestly pressed upon us in this case. We think it possible, as is urged, that there may have been much abuse of this jurisdictional right on the part of Justices of the Peace, and especially in the counties of the State in which are situated our larger cities. In view, however, of the clearly expressed intent of the Legislature, as we find it, we are not at liberty to

consider this argument. If this evil exists, as is urged, its correction must be found elsewhere outside of the Courts.

The result is, the judgment of the lower Court is affirmed.

STATE *v.* ALSTON.

(*Jackson.* April 20, 1895.)

1. TAXATION. *Succession or inheritance taxes constitutional.*

The Legislature has constitutional power to impose a privilege tax upon the right of succession, whether by will, inheritance, or otherwise, to the estates of deceased persons. This right of succession is not a natural right, but a mere privilege created by statute, and subject to such conditions and burdens as the Legislature may choose to impose for the public benefit. (*Post, pp. 678–682.*)

Act construed: Acts 1893, Ch. 174; Ch. 89, Sec. 7.

Cases cited: See numerous citations in opinion.

2. SAME. *Succession tax not void for want of uniformity.*

A statute imposing a succession tax upon collateral kindred and strangers, but exempting direct descendants of the decedent from the tax, is valid. The discrimination is based upon just grounds, and the classification is natural and reasonable, not capricious and arbitrary. (*Post, pp. 682, 683.*)

Cases cited and approved: State *v.* Schlier, 3 Heis., 286; Fulghum *v.* Mayer, 8 Lea, 635; Robbins *v.* Taxing District, 13 Lea, 303; Demoville *v.* Davidson County, 87 Tenn., 218; 2 L. R. A., 825; 25 L. R. A., 632.

3. SAME. *Same.*

A statute imposing a succession tax which exempts all estates of less value than $250 is valid. This exemption is based upon sound reason and policy. (*Post, pp. 683, 684.*)

Case cited and approved: 26 L. R. A., 264.

FROM LAUDERDALE.

Appeal in error from Circuit Court of Lauderdale County. THOS. J. FLIPPIN, J.

State *v.* Alston.

Attorney-general PICKLE and J. P. GAUSE for the State.

W. E. LYNN and W. G. LYNN for Alston.

WILKES, J. This cause involves the constitutionality, and, to some extent, the construction, of Chapter 174, and Section 7 of Chapter 89, of the Acts of 1893, the former being an Act to provide for a collateral inheritance and succession tax, and the latter a section of the general revenue law passed at that session.

The Court below held the Acts to be constitutional; that the interests passing under the will of John J. Alston to his widow and to his brother, Volney S. Alston, were not subject to such tax, but that other devises and legacies were subject thereto, as will be more fully explained hereafter. Both the State and the parties held liable appealed, but the State has assigned no errors.

The facts as agreed upon are substantially as follows: Dr. John J. Alston died in Lauderdale County in June, 1894. He left a will, which was duly probated, and his widow, Mary Frances Alston, is his executrix. He owned the personal property and real estate referred to in his will. This will gives to his widow certain notes on Jones and others, some mill machinery, a life interest in tracts of two hundred and thirty-five acres, one hundred and twenty acres, fifty acres, and five acres of land; all cash on hand or deposit, the rents of a storehouse in

Henning, Tenn., during life, the dividends and profits on his $3,000 of stock in a Ripley bank for life, and possibly some other property. To his niece, Mrs. Lee A. Crutcher, and her husband, W. C. Crutcher, he gave two tracts of land during life, one containing two hundred and forty acres, and the other twelve and one half acres, with remainder to their children. He also gave to his niece and her husband certain live stock.

To Mrs. McCowan and Mrs. Griggs, two nieces, he gave a remainder interest in the tracts of one hundred and twenty acres and fifty acres, in which a life estate was given to the widow, providing that the widow might give them possession before her death if she chose to do so.

The two hundred and thirty-five acre tract and the five acre tract of land, given to the widow for life, is directed to be sold at her death, and the proceeds to be divided one half to the testator's brother, Volney S. Alston, and the other half to two nephews, William and James Dyer.

The decree of the Court below is, substantially, that the property given to the widow, Mary F., and the brother, Volney S., is not subject to the succession or inheritance tax provided by such Acts, but that such of it as was given to William and James Dyer was subject to such tax, but nothing was decreed as to the property given to Lee A. Crutcher and her husband.

It is stated by counsel representing the defend-

ants that there is a clerical mistake in the decree, in that the liabilities of the property given to William and James Dyer are adjudicated, when it was intended to adjudicate the rights of Mrs. Lee A. Crutcher and her husband, and it is agreed that it may be treated as corrected.

William and James Dyer are not parties to the agreed case in the Court below, nor in this Court, but Mr. and Mrs. Crutcher are parties in both Courts, and their counsel in this Court appears for them and waives the error and submits the question as to their liability. Considering the record as thus corrected, we proceed to examine the questions presented.

It is manifest that, by the express terms of the Acts referred to, none of the property of the testator passing under his will to his widow, is subject to the tax therein provided, and we proceed to examine as to the liability of the property, personal and real, given by the will to Lee A. Crutcher and her husband, W. C. Crutcher.

The first section of Chapter 174, Acts of 1893, provides for a tax upon all estates, real, personal, and mixed, situated in the State, whether the person dying seized live in the State or not, passing either by will or inheritance, or by any deed, grant, bargain, gift, or sale made in contemplation of death, or to take effect, in possession or enjoyment, after the death of the grantor, to any person or body corporate or politic, in trust or otherwise,

when the property thus passing goes to any other than the father, mother, husband, wife, children, and lineal descendants, provided that no estate valued at less than $250 shall be subject to said duty or tax, and that the term "children" shall not be construed to apply to adopted children. This Act was intended to put into operation a general system of succession or inheritance taxation, and to repeal all laws in conflict with it. It was approved April 10, 1893, and fixes the rate of taxation at $5 on the $100 of value of the property passing.

On the same day, but whether prior or subsequent in point of time does not appear, the general revenue Act was passed for that session, being Chapter 89; and in the seventh section of the latter Act a similar tax is provided and assessed. This section differs from Chapter 174, in that it exempts property passing to the same parties mentioned in Chapter 174, and, in addition, the following persons: Brothers, sisters, the wife or widow of a son and husband of a daughter, and any legally adopted child; but no mention is made of exemptions of estates of less than $250 in value.

No error is assigned nor point made as to this variance, and, as the question of the effect of the variance is in no way presented, and, as to the parties before us, cannot arise directly, we express no opinion as to this variance and its effect, if any.

It is contended that the Acts are unconstitutional because they attempt to restrain and restrict the dev-

olution of property by will or inheritance by placing a tax upon such devolution; and, again, because the Act is partial, in that the tax is imposed if the property is given to certain persons but not if given to others; and, again, that the tax is not equal and uniform, because small estates of less than $250 in value are exempt from its operation, while those of that amount or over are subject to its provisions.

In considering these grave questions, a short history of succession and inheritance taxes may not be inappropriate. Such taxes were recognized by the Roman law. Gibbons' Decline and Fall of the Roman Empire, Vol. I., pp. 163–4. They were adopted in England in 1780, and have been much extended since that date. Dowell's History of Taxation in England, 148; Acts 20 George III., Ch. 28; 45 George III., Ch. 28; 16 and 17 Victoria, Ch. 51; *Green* v. *Craft*, 2 H. Bl., 30; *Hill* v. *Atkinson*, 2 Merivale, 45. Such taxes are now in force generally in the countries of Europe. *Review of Reviews*, February, 1893. In the United States, they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887; and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, in 1891; Tennessee in 1891, Chapter 25, now repealed by Chapter 174, Acts 1893. They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1863, and repealed in 1884. In New Hampshire, Wisconsin, Minnesota, and Ver-

mont such laws have been passed, but held unconstitutional on various grounds.

Upon general principles the right to tax the succession or inheritance of property is founded on a reasonable basis, since the right of any person to succeed to property of a deceased person, whether by will or inheritance, is a creature of statute law, and the manner in which it shall pass by no means a natural right. 2 Blackstone's Com., p. 10; 2 Kent's Com. (12th Ed.), 325; Dos Passos Collateral Inheritance Tax, 20; *Bretlaur* v. *Fox*, 100 Mass., 234; *Majer* v. *Guina*, 8 How., 490; *Wallace* v. *Meyers*, 4 L. R. A., 171; *Peters* v. *Lynchburg*, 76 Va., 927; *State* v. *Dalrymple*, 70 Md., 294; 3 L. R. A., 372; *Pallen* v. *Wake Co. Com's*, 66 N. C., 361; *Strode* v. *Com.*, 52 Pa., 181; *Re Swift's Estate*, 18 L. R. A., 709; 137 N. Y., 77; *Curry* v. *Spencer*, 61 N. H., 624 (60 Am. R., 337).

This idea is recognized almost universally by statutes which provide the manner in which property shall descend in the absence of any will of the deceased, and in statutes which regulate the passage of property by will.

As the right to succeed depends upon the law of the State, it follows that the State may regulate that right as public necessity or policy may dictate, and may subject it to such burdens and reasonable conditions as may best subserve the purposes of the State.

It must be borne in mind that the tax is not

upon the property, but the right or privilege of acquiring it by succession. It is a condition upon which the person may take the estate of a deceased relative by inheritance or testator by his will. It is a retention by the State of a part of a deceased person's property which the State may take to meet its necessities, and which in certain cases it may take *in toto*, as in cases of escheated property. It is not a tax upon the right of alienation, but on the privilege of receiving by inheritance or will or otherwise, at the death of a former owner. *Strode* v. *Com.*, 52 Pa. State, 181; *Eyre* v. *Jacob*, 14 Gratt., 431 (73 Am. Dec., 367); *Peters* v. *Lynchburg*, 76 Va., 929; *In re Howe's Estate*, 2 L. R. A., 825, and note; *Schoolfield* v. *Lynchburg*, 78 Va., 366; *Clymer* v. *Com.*, 52 Pa. State, 189; *Carpenter* v. *Penn*, 17 How., 463; *Frederickson* v. *Louisiana*, 23 How., 447; *Tyson* v. *The State*, 28 Md., 577; *State* v. *Dalrymple*, 70 Md., 298 (3 L. R. A., 372); Matter of Howard, 5 Denio (N. Y.), 487; *State* v. *Mann*, 76 Wis., 469; *Minot* v. *Winthrop*, 26 L. R. A., 259; *State* v. *Hamlin*, 25 L. R. A., 632; *Scholey* v. *Reed*, 23 Wall., 331; *Re Knoedler's Will*, 140 N. Y., 377; *Re Merriam's Estate*, 141 N. Y., 479.

In *Curry* v. *Spencer*, 61 N. H., 624, reported also in 60 Am. Rep., 337, the constitutionality of such taxes was denied on the ground that the act imposing it was discriminating, unequal, and not proportional. But they have been sustained in very

many cases, only a few of which we cite. *Majer* v. *Guina*, 8 How., 490; *Scholey* v. *Reed*, 23 Wall., 331; *In re Hoare's Estate*, 2 L. R. A., 825; *Wallace* v. *Meyers*, 4 L. R. A., 171; *Eyre* v. *Jacob*, 14 Gratt., 422 (73 Am. Dec., 367); *Tyson* v. *The State*, 28 Md., 577; *State* v. *Dalrymple*, 70 Md., 294 (3 L. R. A., 372); *Re McPherson*, 104 N. Y., 306; *Strode* v. *Com.*, 52 Pa., 181; *Minot* v. *Winthrop*, 26 L. R. A., 259.

In the latter case, the right to transmit property is called a privilege, and also a commodity, in the sense of the Constitution of Massachusetts, and which the State has a right to sell at a reasonable price. See also *Re Romaines' Estate*, 12 L. R. A., 401; *Re Hoare's Estate*, 2 L. R. A., 825; *Catlin* v. *Trinity College*, 3 L. R. A., 206.

Upon reason and authority, we are of opinion that the tax is constitutional, and may be sustained as a tax upon the privilege or condition of receiving property by will or inheritance.

It is next insisted that the tax is not made uniform, but bears unequally, inasmuch as a distinction and difference is made between direct descendants and collateral kindred and strangers. If this is so, it has abundant reason upon which to sustain such discrimination, for the moral claim of collaterals and strangers is less than of kindred in the direct line, and the privilege is, therefore, greater.

It is well settled that classifications may be made of privileges for purposes of taxation, and it has

generally been done in our revenue laws, the only restriction being that the classification should be natural, and not arbitrary. *State* v. *Schlier*, 3 Heis., 286; *Fulghum* v. *Mayer*, 8 Lea, 635; *Robbins* v. *Taxing District*, 13 Lea, 303; *Demoville* v. *Davidson County*, 87 Tenn., 218; *In re Howe's Estate*, 2 L. R. A., 825; *State* v. *Hamlin*, 25 L. R. A., 632.

We conclude that the tax is not unconstitutional because it discriminates between direct descendants and collateral kindred and strangers.

Again, it is said the tax is unconstitutional because of the $250 exemption, and it is properly said the exemption is not of $250 out of all estates, but that estates under $250 in value are exempted from any tax. In other words, an estate worth $249 escapes taxation, but one of $250, or over, is subject to tax.

It is peculiarly within the province of the Legislature to declare what privileges shall be taxed, and what exemptions may be allowed, in order to make taxes bear most lightly upon those least able to bear them, and the exemption of small estates is neither arbitrary, nor is it devoid of good reason, inasmuch as the expenses of administration are proportionately much greater in small than in large estates. In the various States, when such taxes are imposed, there is a similar exemption depending on the size or value of the estate. In New York the limit is $500; in Pennsylvania, $250; in Maryland, New Jersey, Delaware, Maine, Michigan, and California, $500;

in Connecticut and West Virginia, $1,000: in Ohio and Massachusetts, $10,000. Doubt as to the constitutionality of this tax, on the ground of the exemption, has been expressed in *State* v. *Mann*, 76 Wis., 469: *State* v. *Gorman*, 40 Minn., 232; *Le Duc* v. *Hastings*, 39 Minn., 110. But in many other cases the exemption has not been held to affect the validity or constitutionality of the Act. See the cases already cited, and specially the case of *Minot* v. *Winthrop*, 26 L. R. A., 264.

We are of opinion that the Act is not invalid or unconstitutional on account of the exemption. The result is, that, under the provisions of the Acts of 1893, the property given by the will of John J. Alston to his widow, Mary F. Alston, is not subject to the tax imposed by said Act.

The live stock given to W. C. and Lee A. Crutcher is liable to such tax, as well as their life estate or interest in the tracts of two hundred and forty and twelve and one half acres of land, the said Lee A. being a niece of the testator, and W. C. Crutcher a stranger in blood. The interests given by the will to the children of W. C. and Lee A. Crutcher, to Volney S. Alston, to William and James Dyer, to Mrs. McCowan, and Mrs. Griggs, are all estates or interests in remainder, and, by the express terms of Chapter 174, cannot be taxed until the termination of the life estates in the same premises, and the question of their liability cannot now be properly adjudicated.

State *v.* Alston.

The decree of the Court below is modified as herein indicated, and otherwise affirmed. The costs of the cause on appeal will be paid, one half by the State and the other half by W. C. and Lee A. Crutcher. The cost of the Court below will remain as therein adjudicated.

MORGAN *v.* DUFFY.

(*Jackson.* April 20, 1895.)

1. CONTINUANCE. *Properly refused.*

The Court's action refusing continuance, and directing joinder of formal issue upon a plea, and immediate trial, is not erroneous, when no objection was made to the state of the pleadings until the case was called for trial, and it does not appear, either by affidavit for continuance or for new trial, that any injury resulted from the Court's action. (*Post, pp. 687, 688.*)

2. MALICIOUS PROSECUTION. *Malice.*

Actual malice, in the sense of ill will or personal hatred, need not be shown to sustain action for malicious prosecution. Any improper motive is sufficient to constitute legal malice, and malice will be inferred when the avowed object of an unsuccessful prosecution was to enforce payment of a debt. (*Post, p. 688.*)

Case cited and approved: 13 Neb., 492.

3. SAME. *Advice of counsel.*

Advice of counsel affords no defense to a charge of malicious prosecution where the facts were known to defendant and his counsel and did not justify the belief that plaintiff was probably guilty of the crime charged. (*Post, pp. 689, 690.*)

4. SAME. *Statute of limitations.*

Until a prosecution is ended, the statute of limitations does not begin to run against an action for malicious prosecution based thereon. (*Post, p. 690.*)

5. SAME. *Damages not excessive.*

A verdict for $500 damages in an action for malicious prosecution is not excessive where the proof shows that plaintiff was arrested and imprisoned on a charge of felony, without probable cause, and for the avowed purpose of compelling him to pay a debt. (*Post, pp. 690, 691.*)

6. ARGUMENT OF COUNSEL. *Not ground for reversal, when.*

Improper remarks of counsel, made during the course of argument, afford no cause for reversal where no objection was made at the time of their utterance, and no action of the lower Court invoked thereon. (*Post, p. 691.*)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

BELL & HORN and L. D. CARDWELL for Morgan.

WILLIAM FITZGERALD and F. J. BYRNE for Duffy.

WILKES, J. This is an action for malicious prosecution. The case was tried before the Judge and a jury, and resulted in a verdict for the plaintiff for $500, and defendant has appealed and assigned errors.

Morgan was arrested upon a Justice's warrant charging him with having obtained goods under false pretenses. He was placed in jail about five o'clock one evening, and released about ten o'clock the next morning. The declaration alleged that the prosecution of plaintiff was finally ended January 3, 1893, and the summons in this case was issued December 29, 1893. The defendant plead the statute of limitation. It was filed February 9, 1894. The cause was set for trial December 7, 1894. It was then

reset for January 4, 1895. When it was called on the latter day, defendant asked for continuance on the ground that no issue had been taken upon his plea of the statute of limitation. The Court thereupon directed issue to be joined, which was done, and the Court refused the continuance. The joinder of issue in such case was matter of form, and it is not shown that defendant was in any way prejudiced by being required to go to trial without continuance. He made no affidavit, nor does it appear that any of his witnesses were absent, or that he was in any way unprepared for trial, nor does such fact appear from the affidavit on motion for new trial. It is said that the verdict of the jury was contrary to the charge of the Court and to the evidence, inasmuch as no malice was shown and defendant acted on the advice of counsel and had no actual malice. Actual malice, in the sense of ill will or personal hatred, need not be shown. Any improper motive is sufficient to constitute legal malice, and malice will be inferred when the object of the prosecution is to enforce payment of a debt. 14 Am. & Eng. Ency. of Law, 23; *Ross* v. *Langnulty*, 13 Neb., 492.

It is not claimed that there is any error in the charge of the Court on this point. It appears from the proof, and, indeed, from the statement of defendant himself, that, while he had no actual malice against plaintiff, he began the prosecution in order to compel the plaintiff to pay a debt he owed him.

Plaintiff, just previous to the time of the prosecution, had been engaged in a small restaurant business on Beale Street, city of Memphis, and had bought his goods largely from the defendant. The defendant's contention was, that plaintiff represented that certain fixtures and furniture for the restaurant belonged to him; that they had been paid for in cash, and, upon this assurance he extended him credit, when, in fact, the fixtures did not belong to him. Plaintiff contends that he practiced no fraud, but told defendant, afterwards, in order to borrow money, that certain goods and furniture, etc., in the restaurant belonged to him, but that he had bought them on a credit, and wanted to borrow money to pay for them; in short, that he told him the entire status of the matter fully and frankly; that defendant, thereupon, promised to loan him some money, but, after having a deed of trust prepared to secure it, he declined. Whereupon plaintiff made a deed of trust upon the goods and furniture to secure the debts owing for them. This deed of trust the defendant attacked for fraud, and a trial was had in which the whole matter was thoroughly gone over and ventilated, resulting in the Justice of the Peace sustaining the deed of trust as valid. Thereupon the defendant immediately demanded the State's warrant for obtaining money under false pretences, saying, as he did so, that if plaintiff did not pay him what he owed him he would put him in the penitentiary.

The facts developed on that trial did not justify

defendant in suing out the State's warrant, and it is hardly probable that any attorney would have advised it, and there was no probable cause to believe the plaintiff guilty of the offense charged. We think defendant cannot justify on the ground of counsel's advice, nor of probable cause to believe plaintiff guilty when the whole facts were thus developed before him and his counsel.

As to the statute of limitations, the proof shows the arrest was made December 20, 1892, and that plaintiff was finally discharged from prosecution December 30, 1892, and this action was commenced December 29, 1893. The statute had not run and it is not a defense. The action was for malicious prosecution as well as false imprisonment, and the statute did not begin to run as to the prior offense until the prosecution was ended. *Goodwin* v. *Guild*, S. W. Reporter.

It is said the evidence does not show that plaintiff was sent to jail on the warrant issued by defendant, but that he was also arrested on a warrant at the same time for embezzlement. This question was fairly left to the jury, and all the facts connected with the arrest, under both charges, were fully stated. The mere fact of being sent to jail did not constitute the entire offense of malicious prosecution. It is sufficient to say that plaintiff was sent to jail, possibly, under both warrants, but, under the evidence, more probably under the one sworn out by defendant.

It is said the damages are excessive. There was

a total want of probable cause to believe the plaintiff guilty. He was arrested and imprisoned, and the prosecution is shown to have been for the purpose of forcing plaintiff to pay a debt owing by him to defendant. The jury has passed upon it under all the facts, and the Circuit Judge has not seen proper to disturb it, and we cannot say it is excessive, but to the contrary.

Counsel for plaintiff made improper remarks in the course of his argument, stating that the Criminal Courts of the country were prostituted by using them as engines of oppression in the collection of debts; that the jury had no conception of the extent to which this practice was carried, and he hoped they would show, by their verdict, that the Court could not be prostituted in that way. He also said he had never heard of a case where the Supreme Court had reversed a verdict of a jury for excessive damages. He cited three cases from Texas, but did not read from any reports, in which he said that the Court did not set aside verdicts for $3,000 in one, $8,000 in one, and $10,000 in another case, and that, no matter what verdict was rendered, it would not be reversed by the Supreme Court because excessive. No objection was made at the time of the utterance of the objectionable words, nor were they afterwards asked to be excluded, or that the jury be warned to disregard them.

The judgment of the Court below is affirmed, with costs.

BURKE *v.* MEMPHIS.

(*Jackson.* April 23, 1895.)

1. STATUTES. *Repeal.*

Statutes "to provide revenue for the State of Tennessee and the counties thereof," cannot have the effect to repeal by implication earlier statutes providing revenue for municipal corporations. (*Post, pp. 692–694.*)

Acts construed: Acts 1879, Ch. 11; Acts 1883, Ch. 10; Acts 1889, Ch. 130; Acts 1891 (Ex. Sess.), Ch. 25, p. 50.

Case cited and approved: Knoxville *v.* Lewis, 12 Lea, 180.

2. TAXATION. *Architects subject to privilege tax.*

The occupation or business of an architect may be declared a privilege, and taxed as such. (*Post, pp. 694, 695.*)

Cases cited and approved: Kurth *v.* State, 86 Tenn., 134; Mayor *v.* Guest, 3 Head, 414; Dun *v.* Cullen, 13 Lea, 202.

FROM SHELBY.

Appeal from Circuit Court of Shelby County. L. H. ESTES, J.

T. A. RYAN for Burke.

METCALF & WALKER for Memphis.

WILKES, J. The defendants are architects, and were each arrested and fined $25 for failing to take out city license for 1892, and the only question pre-

sented is, whether they are liable for a privilege tax upon their occupation for that year.

Defendants' contention is that the Acts of the General Assembly of Tennessee, passed at the Extra Session, 1891, page 50, repealed the Act of 1889, Chapter 130, and all other revenue Acts prior in date, and, inasmuch as the Acts of 1891, Extra Session, omitted to tax the occupation of an architect as a privilege, as had been done under Chapter 130, Acts 1889, there was no law in force in 1892 making the occupation of architect a taxable privilege.

In this contention, we think counsel is in error. The Act of 1891, Extra Session, page 50, is entitled "An Act to amend Chapter 130 of the Acts of the General Assembly of 1889, entitled 'An Act to provide revenue for the State of Tennessee and the counties thereof.'" It was not the purpose of the Act of 1889 or 1891 to provide for anything else except revenue for State and county purposes; and they did not in any way refer to taxes for purposes of municipal corporations.

By the Act of 1879, Chapter 11, the General Assembly passed the Taxing District Act, which was afterward amended in 1883, Chapter 10, and by other Acts. The purpose of these Acts, as shown by their captions and provisions, was to create taxing districts, and provide means of local government of the same, and by the latter Act, among the list of taxable privileges, architects were named, and this

Act was in force when this tax accrued in 1892, and was not in anywise affected by the Acts passed, subsequently, to provide State and county revenue. Municipal taxes are not taxes for State and county purposes, and are not included under the terms of an Act to provide State and county revenue. *Mayor and Aldermen of Knoxville* v. *Lewis*, 12 Lea, 180.

This same ruling was made in the unreported case of *The Taxing District* v. *The Pacific Express Co.*, decided by this Court May 28, 1888. The judgment in that case has this recital: "That Chapter 5 of the Acts of the Extra Session of 1885 did not operate to repeal Section 13 of Chapter 96 of the Acts of 1881 (a taxing district Act), by which a privilege tax of $250 annually is required to be paid to the plaintiff in error by all express companies doing business within the limits of said taxing district, and under the latter Act the express company was held liable for the privilege tax of $250. See also 1 Desty on Taxation, 105.

Again, it is said that the occupation or business of an architect cannot be made a taxable privilege, that it is a profession requiring intelligence and brains, and these should not be taxed. Many of the occupations, if not all, that are taxed as privileges require more or less of intelligence and brains to successfully conduct them, and we see no reason to make an exception in favor of architects. A privilege is whatever the Legislature chooses to declare and tax as such, and a positive prohibition,

or the power to prohibit, is not essential to its validity. *Kurth* v. *The State*, 2 Pickle, 134; *Mayor* v. *Guest*, 3 Head, 414; *Jenkins* v. *Irwin*, 8 Heis., 456; *Dun* v. *Cullen*, 13 Lea, 202.

This holding is in nowise in conflict with the ruling of this Court in the *Lawyers' Tax Cases*, 8 Heiskell, 565, *et sequitur*.

There is no error in the judgment of the Court below in either case, and the judgments are affirmed with costs.

CUMBERLAND TELEGRAPH & TELEPHONE CO. *v.* POSTON.

(*Jackson.* April 25, 1895.)

1. DAMAGES. *Evidence of wrongdoer's pecuniary ability admissible. when.*

When there is any substantial ground or reason for allowing punitive damages, the pecuniary ability of the wrongdoer may be given in evidence. (*Post, pp. 698, 699.*)

Cases cited and approved: Dush *v.* Fitzhugh, 2 Lea, 307; Railroad *v.* Guinan, 11 Lea, 103.

2. CHARGE OF COURT. *Meager and incomplete not reversible.*

An incomplete and meager charge, if not misleading, affords no cause for reversal when no request for additional instructions was made. (*Post, pp. 699. 700.*)

Case cited and approved: Maxwell *v.* Hill, 89 Tenn., 585.

3. EVIDENCE. *General exceptions.*

A general exception that evidence is incompetent and immaterial, without stating grounds, is bad. (*Post, p. 700.*)

Cases cited and approved: Druggist Cases, 85 Tenn., 449; Railroad *v.* Fleming, 14 Lea, 129; Powers *v.* McKenzie, 90 Tenn., 167; Railroad *v.* Beeler, 90 Tenn., 548; Graham *v.* McReynolds, 90 Tenn., 689.

4. DAMAGES. *Not excessive.*

Where the proof is conflicting, a verdict for damages based upon it, and reasonably sustained by it, will not be set aside as excessive. (*Post, p. 700.*)

Case cited and approved: Memphis Tel. Co. *v.* Hunt, 16 Lea, 456.

FROM SHELBY.

Appeal from Second Circuit Court of Shelby County. J. S. GALLOWAY, J.

ELDRIDGE WRIGHT and TURLEY & WRIGHT for Telegraph & Telephone Company.

W. K. POSTON for Poston.

WILKES, J. The defendant company was sued before a Justice of the Peace for damages for cutting and disfiguring the plaintiff's ornamental holly trees upon a residence lot near Memphis. There was a judgment before the Justice of the Peace for the plaintiffs for $400, and an appeal to the Second Circuit Court, where there was a trial before the Judge and a jury, and a verdict and judgment for the plaintiffs for $300, and the defendant company has appealed, and assigned errors.

The company had been for several years operating a telephone line in front of plaintiffs' premises. Desiring to change the location of the poles and line, the superintendent of the company applied on the premises for permission to trim up the limbs of some holly trees located near the front fence, but was answered by the lady in charge of the house that the property was in the hands of tenants, and that the company could only get permission from the owner, and his address was furnished the superintendent. The superintendent was accosted in the street or road, near the premises, on the same day, by a gentleman who inquired when the street car line would be completed out to that point. He further stated that he owned the property on the hill, and was anxious to have the car line extended

as soon as could be done. Thereupon, the superintendent said to him that he was connected with the telephone company, and not with the railroad, and wanted his permission to cut away some limbs from the evergreen trees in the yard, so as to not interfere with his line, and the party said that was all right, or there would be no objection.

It appears that the party thus interviewed was not the owner of the trees or the property in question, but of a contiguous property, very much the same in description and appearance, but having no holly trees in the front yard.

The superintendent of the telephone, supposing that he had the necessary permission from the owner of the premises, cut off the limbs from three of the holly trees, greatly disfiguring them. They are shown to have been planted with much care, some thirty-five years before, and were very shapely, highly ornamental, and much prized evergreens, very difficult to transplant and to keep alive. The owners of the property brought suit for the damage sustained, with the result as stated.

The errors assigned are:

To the admission of any testimony in regard to the pecuniary ability of the defendant company. The plaintiffs in the case were suing for both compensatory and punitive damages. There was a wide difference of estimates under the first head, ranging from nothing to $500 per tree. There was also evidence sufficient, we think, to raise the question

of gross negligence on the part of the company in not exercising more caution to find and obtain the consent of the true owner of the property that the trees might be cut, and also in the manner in which the cutting was done, and in cutting the trees at all. It satisfactorily appears that the trees were only thirty-five to forty feet high, and, by the use of three poles of fifty feet in length, cutting the trees might have been entirely avoided, and it is shown the company had such poles on its yards in Memphis at the time, and it is not shown why the line might not as well have been located so as not to touch the trees, as had previously been the case.

We think there was sufficient evidence of gross negligence and wantonness to justify the admission of evidence with a view to punitive damages, if the jury should decide it to be a proper case for such damages. The jury, upon this point, was charged that if the cutting was done fraudulently, oppressively, or with gross negligence, they might, in their discretion, give punitive damages.

It is assigned that the Judge's charge was incomplete, meager, and misleading. We do not find it misleading, as far as it goes, and there was no request for an additional charge. In such case this Court will not reverse for meagerness of the charge. *Maxwell* v. *Hill*, 5 Pick., 585, and authorities there cited.

When there is any ground or reason for punitive damages, the pecuniary ability of the wrongdoer may

be given in evidence. *Dush* v. *Fitzhugh*, 2 Lea, 300; Sedgwick on Damages (8th Ed.), Sec. 385; Sutherland on Damages, p. 744, 745; *Railroad* v. *Guinan*, 11 Lea, 103.

But the exceptions to the evidence of pecuniary ability were general, to wit, that the evidence was incompetent and immaterial, but without stating the grounds. *Druggist Cases*, 1 Pick., 449; *Railroad* v. *Fleming*, 14 Lea, 129; 6 Pick., 167, 548, 689.

It is said the damages are excessive. Only three trees were trimmed. There is much difference between the witnesses as to the value of these trees and the damage done by cutting them. The trees are estimated to be worth as high as $500 each. Other witnesses do not attach any value to them. Some witnesses state that the trees are practically ruined. Others state that the damage is slight if anything. It is shown that the rental value of the property has not been diminished, and opinions are expressed that the market value has not been changed. The matter was peculiarly for the jury to determine, and there is ample evidence to support their verdict upon the idea of actual or compensatory damages alone. *Memphis Telephone Co.* v. *Hunt*, 16 Lea, 456.

There is, therefore, no reversible error in the record, and the judgment of the Court below is affirmed with costs.

BROOKS *v.* PAPER CO.

(*Jackson.* April 25, 1895.)

1. SUPREME COURT. *Will not reverse upon the facts, when.*

If there is sufficient evidence in the record to sustain a general verdict upon a correct charge, this Court will not reverse a non-jury law cause because the special findings of facts made by the trial Judge, without request of either party, are erroneous and insufficient to support the judgment rendered thereon. (*Post, p. 705.*)

2. SALES OF PERSONALTY. *Complete, when.*

The sale of goods is complete and title passes, subject alone to stoppage *in transitu* and avoidance for fraud, upon their unconditional delivery to a common carrier for shipment to the purchaser. (*Post, pp. 705–710.*)

Cases cited and approved: Boyd *v.* Mosely, 2 Swan, 661; Mississippi Mills *v.* Bank, 9 Lea, 314; Ochs *v.* Price, 6 Heis., 483; Harding *v.* Metz, 1 Tenn. Ch., 610.

Cited and distinguished: Belding Bros. *v.* Frankland, 8 Lea, 67.

3. SAME. *Purchaser's insolvency.*

The purchaser's insolvency, occurring after the completion of the contract of sale and delivery of the goods to the carrier for shipment to him, but before their actual receipt by him, does not, in the absence of fraud, defeat his title. (*Post, p. 710.*)

4. SAME. *Unconditional, when.*

The title of goods vests in the purchaser upon completion of the sale without payment of the purchase price, unless payment of the price is made a condition precedent to the vesting of title by express contract or necessary inference. (*Post, pp. 710–712.*)

Brooks v. Paper Co.

Cases cited: Harding v. Metz, 1 Tenn. Ch., 610: McClure v. Williams, 5 Sneed, 716.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

R. M. HEATH and HAYNES & HAYS for Brooks.

SMITH & TREZEVANT for Paper Company.

MCALISTER, J. The object of this suit is to recover the value of certain wall paper sold by the Geo. H. Friend Paper Company, of Carrollton, Ohio, to the firm of Brooks & Cole, conducting business at Memphis, under the name and style of the "Tennessee Paper Company." The suit as originally commenced was in replevin, but the officer failing to get possession of the goods, the case has been prosecuted in detinue. Code, § 4119. The Circuit Judge, sitting without the intervention of a jury, found the issues in favor of the plaintiff, and pronounced judgment in its favor for $374.15. The defendant, Brooks, appealed, and has assigned errors.

The main controversy presented in the record is whether. the title to the goods had passed to the

purchasers, Brooks & Cole, so as to be embraced in an assignment made by this firm to L. S. Brooks, trustee. The Geo. H. Friend Paper Company had frequently sold goods to Brooks & Cole, and when the latter firm made their assignment, January 31, 1893, they were indebted to the former not only for the goods in controversy, but likewise for several other purchases. The particular invoice of paper sued for in this case was ordered by letter January 14, 1893, in which terms of payment were not mentioned. The goods were shipped by the Geo. H. Friend Paper Company January 21, 1893. They reached Memphis Saturday, January 28, and remained in the railroad warehouse until Monday, the thirtieth, when they were delivered to Brooks & Cole. On the following day—to wit, January 31—Brooks & Cole made an assignment. This assignment had been contemplated for several days, and, in fact, the instrument had been prepared and was ready for execution on Saturday, January 28. It was actually signed and delivered, as already stated, on January 31.

This assignment, it is claimed, was brought about by the failure of the Harding Paper Company to permit Brooks & Cole to renew a note for $1,500 which they owed that company, and which would mature February 1, 1893. Mr. R. W. Brooks testified that, about ten days before the date of the assignment, a representative of the Harding Paper Company came to Memphis and "called upon me

in regard to the Harding Paper Company debt, and, I learned, was making investigation as to the financial standing of my firm, * * * and was endeavoring in every way possible to pry into my business. He announced his determination to remain in Memphis until maturity of his debt and collect the same. The Harding Paper Company had theretofore promised an extension of this paper. I thereupon wrote to this company and reminded them of their promise. If this note could have been extended, my firm would have been able to continue business, but not being able to make any arrangement with the Harding Company, or its agent, * * * by direction of my firm our attorney prepared a special assignment on January 28, 1893, as a prudential measure, and dated it that day, * * * trusting the Harding Company would still agree to extend the note, but, being unable to procure an extension of the paper, or an interview with Mr. Harding, on the thirty-first of January the deed was acknowledged and filed for registration. It embraced 'all that portion of our property now contained in the certain three story brick building belonging to L. B. McFarland, No. 343 Second St., Memphis, Tenn.' Also our stock of goods, wares, and merchandise now in said above mentioned and before described three story brick building * * * consisting of wrapping paper," etc.

The assignment was special and preferential. The debt sued for in this action is not mentioned, al-

though six other debts due plaintiff, amounting to $1,130.86, are specified but not included in the preferred class.

It should be stated that, on February 27, 1893, plaintiffs, by their attorneys, made demand, in writing, for the goods of the trustee, L. J. Brooks. The letter concluded, viz.: "Our clients look to you either for the goods or their value." The trustee, however, continued to sell off the stock until March, 13, 1893, when the writ of replevin was sued out. The sheriff was unable to find the goods and so returned the writ. The plaintiff thereupon elected to prosecute the case in detinue.

The plaintiff in error bases his assignments of error upon the special findings of the trial Judge. There was no request for the Circuit Judge to reduce his findings to writing, and, under the well-established practice of this Court, such findings are equivalent to a general verdict upon a correct charge, and, if there is any evidence upon which such general verdict might have been based, it will not be disturbed. If, therefore, the Circuit Judge was in error upon all his findings, or if his findings were all correct, but wholly immaterial, if there was still any theory supported by material evidence upon which a general verdict might be based, it would be in conformity with the well-recognized practice to affirm it.

The Circuit Judge, in his written opinion, states, viz.: "On January 28, 1893, 119 reams of this

order arrived in the city by rail, and were delivered on January 30. The next day, January 31, at 1:15, the firm had executed the trust and put it of record. R. W. Brooks at that time left out the amount of this last order to plaintiff, although he specifies six other purchases made of this plaintiff and the amount of each, amounting in all to $1,130.80. I am satisfied," says the Court, "that R. W. Brooks left this claim out because he did not consider that he owed it. At that time the firm did not authorize the payment of this claim, so I must conclude that it was not intended to be paid for by the trustee." * * * The Court also found that the sale was not completed until the goods were received by Brooks & Cole.

We think the Circuit Judge was in error in concluding that, because the debt due the Friend Paper Company was not secured by the special assignment of Brooks & Cole to L. J. Brooks, trustee, or named therein, therefore, Brooks & Cole did not consider that they owed it, and did not recognize the goods as their property. The Circuit Judge, in this finding, overlooked the fact that this assignment was special, and did not purport to embrace the entire indebtedness of this firm, or to include all of its assets. No inference prejudicial to their title is to be drawn from such omission. This case is not controlled by the principle settled in *Belding* v. *Frankland*, 8 Lea. That was a general assignment, in which the assignors conveyed all their property

of every description for the benefit of all their creditors. The assignors, Levison & Bro., were utterly insolvent at the time of their purchase of the goods from Belding Bros. & Co., and must have known the fact, their assignment being made only three days after the shipment of the goods. They did not include the goods in their assignment to the defendant, nor mention the plaintiffs in their schedule of liabilities; and, as soon as they learned that the goods had been received by the trustee after the assignment, they desired him to ship them back to plaintiffs. The facts presented in this case are entirely dissimilar.

It does not appear that Brooks & Cole were insolvent at the time the goods were ordered, and the firm intended in good faith to pay for them; nor does it appear that this firm was insolvent on January 21, when the goods were shipped. The sale was complete, and the title to the goods vested in Brooks & Cole the moment the goods were delivered to the carrier for shipment, subject alone to avoidance for fraud and stoppage *in transitu*. *Boyd* v. *Mosely*, 2 Swan, 661; 6 Heis., 483; *Mississippi Mills* v. *Bank*, 9 Lea, 314. The fact that the purchasers, Brooks & Cole, made a special assignment the day after these goods were received did not affect their title or authorize the vendor to re claim the goods, no fraud being shown.

The case of *Pike* v. *Wieting*, 49 Barb., cited by counsel, does not support the contention of ap-

pellee. The syllabus of that case is, viz.: "A liquor merchant in Syracuse, in former good standing with the plaintiffs' firm in New York, gave a verbal order to the plaintiffs for a bill of goods on credit, which were sent to him by railroad, and left in a storehouse at Syracuse. The merchant was in fact insolvent, and became fully aware of it before he paid the freight and took the goods into custody. Held, that the Judge properly instructed the jury that it would be a fraud upon the plaintiffs sufficient to avoid the sale if they believed, upon the evidence, that the purchaser received the goods with a preconceived design not to pay for them, although he had no such design when he gave the order.

This case is cited in *Belding* v. *Frankland*, 8 Lea, and would seem, from the head note, to be a direct authority for the contention of plaintiff—to wit: That, although Brooks & Cole may have been solvent when they ordered the goods, if they became insolvent before the goods were received, and, notwithstanding knowledge of such insolvency, received the goods, this would constitute such a fraud as would vitiate the sale and authorize the vendor to reclaim the goods.

When, however, we look to the body of that opinion, we perceive a very important distinction, and that is, the sale being verbal, the title to the goods, under the New York statute of frauds, had not vested in the purchaser.

The Court said: "The single question presented is whether, in an executory sale, void by the statute of frauds, the intervening insolvency of the purchaser and the preconceived intent not to pay for the goods, formed at the time they were received and accepted by the purchaser, avoids the sale upon the ground of fraud. * * * It was claimed on the trial by defendant's counsel that the contract was complete when the purchaser received the bill of goods. * * * But I think it is too plain for argument, that an acceptance cannot be based upon the receipt of the bill by the purchaser, for he is not to be concluded until he has an opportunity of examining the goods. The contract of purchase was not only executory, but remained invalid until the receipt and acceptance of the goods by the purchaser on July 2. Until then, it was open to either party to refuse to complete the sale. * * * In my opinion," says the Court, "a purchaser of goods under an executory contract of sale void until acceptance, is guilty of fraud, if, before he concludes the purchase, he becomes hopelessly insolvent, and afterwards takes a delivery of them with a design not to pay."

The soundness of this opinion we do not question, but it is wholly inapplicable to the case now being decided. We grant that if the title to the goods had not vested in Brooks & Cole before their insolvency, the property could be reclaimed, as held by the New York case.

There is in this case, however, no executory contract of sale contingent upon the performance of any annexed conditions, nor void under our statute of frauds until an actual acceptance of the goods by the purchaser. Under the uniform holdings of this Court, this is a bargain and sale as contradistinguished from an executory agreement. By the delivery to the carrier the paper became vested in the purchaser, subject only to the seller's right of stoppage *in transitu* or avoidance for fraud. *Boyd* v. *Mosely*, 2 Swan, 661; *Mississippi Mills* v. *Bank*, 9 Lea, 314; *Harding* v. *Metz*, 1 Tenn. Ch., 610.

The fact that the purchaser became insolvent before the goods reached their destination, does not divest a title which vested, without fraud.

It is next insisted by counsel for appellee that the judgment below should be sustained, for the reason that the sale was impliedly for cash, and that neither the purchaser nor their assignee had any right to take possession without payment, and that this condition precedent was not waived by the vendor in permitting the purchasers to take possession without a compliance with this condition. This contention is based mainly upon the authority of *Harding* v. *Metz*, 1 Tenn. Ch., 610. In that case it appeared that Harding sold to Steifel & Pfeiffer 1,000 bushels of barley, "to be paid for on delivery." About the time all the barley had been delivered Steifel & Pfeiffer became embarrassed, and

made an assignment of all their property to Metz, trustee, for the benefit of all their creditors.

The question raised in that case was whether the title to the barley passed by the delivery to Steifel & Pfeiffer or remained in Harding because of the failure to pay the price. The Court said: "If parties agree upon the terms of sale of personalty and annex no condition to the contract, the property passes to the buyer without delivery or tender of price. * * * But the parties may annex a condition which will prevent the vesting of title to the property, although actually delivered, until the condition is performed. Thus the sale may be on condition that the title remain in the seller until the price is paid, and in such case, until payment, the seller may follow the property even into the hands of a purchaser for value and without notice. The usual condition annexed to contracts of sale is, as in the present instance, the payment of the price. If this condition be not express, even if the sale be for cash, it would ordinarily be waived by a delivery of the property to the vendee without more. But," continues the Court, "if the condition be express that the goods are to be paid for on delivery, and they are delivered under the expectation that the condition will be immediately performed, and the seller comes with reasonable speed and demands performance, the English and American authorities are agreed that, if performance is refused, no property in the goods passes to the vendee, and the vendor

may maintain replevin for them in the hands of the vendee or a purchaser with notice, or any person such as an assignee under a general assignment for creditors who stand in the shoes of the assignor."

It was held that case fell within the principle just announced. But the case at bar cannot be assimilated to that case. When the goods were ordered by Brooks & Cole and shipped by the Geo. H. Friend Co., there was no stipulation expressed that the goods were to be paid for in cash on delivery, as in the case of *Harding* v. *Metz.* Nor was there any such condition to be implied from their course of dealing, for it appears that it had previously been the custom of these firms to deal on credit, and, at the date of this purchase, Brooks & Cole were indebted to the paper company on account of six purchases already made and past due. It is very plain, therefore, that there is no room in this record for the application of the principle decided in *Harding* v. *Metz.* See, also, *McClure* v. *Williams*, 5 Sneed, 716.

Our conclusion is that plaintiffs are not entitled to recover. This may result in a hardship to plaintiffs, but we are unable to perceive any sound basis upon which a recovery in their favor can be rested.

Reversed, and judgment here in favor of L. J. Brooks.

QUINN *v.* RAILROAD.

(*Jackson.* May 2, 1895.)

1. MASTER AND SERVANT. *Railroad company and its physician are not.*

A physician or surgeon employed by a railroad company to attend upon its employes injured in its service, does not bear the relation of servant to the company. (*Post, pp. 716–718.*)

Cases cited: 11 Bush, 464; 92 Mo., 221; 63 Mich., 639; 17 Ill. App., 213; 60 Fed. Rep., 365.

2. RAILROADS. *Not liable for injuries resulting from unskillfulness of their physicians.*

If a railroad company places an employe, injured in its service, in the care of a competent and reputable physician for treatment, it is not responsible for any injury resulting to the employe from the malpractice of the physician. (*Post, pp. 718–720.*)

Cases cited: 13 So. Rep., 638; 60 Fed. Rep., 365; 13 N. E. Rep., 781 (S. C., 107 N. Y., 228); 28 N. E. Rep., 266; 18 Fed. Rep., 221; 120 Mass., 432; 20 L. R. A., 338.

FROM SHELBY.

Appeal from Circuit Court of Shelby County. L. H. ESTES, J.

JAMES M. GREER and C. D. M. GREER for Quinn.

ADAMS & TRIMBLE for Railroad.

Quinn *v.* Railroad.

BEARD, J. One Quinn, the intestate of plaintiff in error, was an employe of defendant, and was seriously crushed by the driving wheel of one of its engines while engaged in the discharge of his duty as switchman in the yards of the railroad at Holly Springs, Miss. Immediately after the injury, he was taken in charge by a surgeon employed by the defendant to render surgical attention to such of its employes as were injured at that place while in its service. He at once placed himself in communication by wire with the chief surgeon of the railroad, whose duty, under his employment, was to render personal attention in such cases, and to exercise supervisory care over its local surgeons, including the one in personal charge of Quinn. This chief surgeon lived, and at the time was, in Memphis, in this State. The result of this communication was that, the latter having decided it was best for the wounded man that he should be brought to his father's home in Memphis, where he could more safely and intelligently receive surgical care, announced his decision to the railroad authorities, and requested them to prepare at once to bring him in. In obedience to this direction, a special train was made up without unnecessary delay, and Quinn, accompanied by the Holly Springs surgeon, was taken on board, and, after a rapid run, was delivered over, at the depot of the railroad in Memphis, into the keeping of the chief surgeon. Within a few hours thereafter the intestate of plaintiff died.

This action was brought to recover damages against the railroad for negligence in various particulars resulting in his death. Among other grounds of negligence laid in the declaration, was that defendant failed to provide the intestate with 'proper medical service, and that this failure greatly aggravated his condition and largely contributed to his death.

On the trial of the case the Court below excluded certain evidence offered by plaintiff in error, which tended to show that these surgeons were unskillful in their treatment of the patient, and that this unskillfulness was one of the active causes contributing to his death.

When he came to instruct the jury, the trial Judge, among other things, said to them: "If deceased was put in charge of physicians of good reputation, it was their business to stop the flow of blood, if any, and defendant is not liable for any failure to stop this flow while the patient was in charge of, or after he was put in the charge of, the physicians. If deceased was put in the hands of competent surgeons of good reputation and standing in their profession, defendant is not liable for any treatment given the patient by them, or by others under their advice."

The action of the Court below in excluding this testimony and in giving this instruction is now assigned as error.

Before considering this assignment, it is proper to say the record tends to show that both those

surgeons were men of fine reputation for learning, skill, and experience in their profession, and that for the service rendered to the deceased, as in all other similar cases, they were paid by the corporation, without cost or charge to him or to his estate.

The question presented by this assignment is new in this State. It is almost as new to the Courts outside the State. The diligence of counsel in this cause, and the investigations of this Court, have resulted in finding but few cases involving it, and these of so recent a date that neither they, nor the rule announced by them, have been carried into the latest text-books on railway law.

Plaintiff in error insists that the defendant in error is liable for the mistakes or malpractice of the surgeons in question; that their employment by the railroad created the relation of master and servant; and that the ordinary rule, which makes the master liable for the negligent acts of his servant within the scope of his employment, is to be applied in this case. If he be correct in his contention that the relation between the railroad and these surgeons was that of master and servant, then his conclusion would properly follow. But was that the relationship? We do not think so. The term "servant," as it is used in connection with the rule invoked, has a well-defined meaning. It "is applicable," says Mr. Thompson in his work on Negligence, Vol. II., p. 892, "to any relation in

which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong; and this right to control appears to be the conclusive test by which to determine whether the relation exists."

"For the relation to exist, so as to make the master responsible, he must not only have the power to select the servant, but to direct the mode of executing, and to so control him in his acts in the course of his employment, as to prevent injury to others." *Robinson* v. *Webb*, 11 Bush, 464. To the same effect is *Mound City Co.* v. *Conlon*, 92 Mo., 221; *Wiltse* v. *State, etc.*, 63 Mich., 639; *Anderson* v. *Bordecker*, 17 Ill. App., 213.

The term "master" is equally well defined in the law. A "master," in the sense of the rule, is "one who has the superior choice, control, and direction; whose will is represented not merely in the ultimate result in hand, but in all its details; one who is the responsible head of a given industry; one who has the power to discharge; one who not only prescribes the duty, but directs, and may at any time direct, the means and methods of doing the work." Eng. & Am. Ency. of Law, Vol. XIV., p. 745.

If it be, as these authorities indicate (and it cannot be otherwise), that the decisive test of this relationship, or even one of its decisive tests, is that the master has the right to select the end of the

servant's employment, and that the master's uncontrolled will is the law of the servant "in the means and methods" by which this end is to be reached, then it cannot be maintained that these surgeons were the "servants" of this corporation. They were not employed to do ordinary corporate work, but to render services requiring special training, skill, and experience. To perform these services so as to make them effectual for the saving of life or limb, it was necessary that these surgeons should bring to their work not only their best skill, but the right to exercise it in accordance with their soundest judgment and without interference. Not only was this the right of these surgeons, but it was as well a duty that the law imposed. If the railroad authorities had undertaken to direct them as to the method of treatment of the injured man, and this method was regarded by them as unwise, they would have been "bound to exercise their own superior skill and better judgment and to disobey their employers, if in their opinion the welfare of the patient required it." *Union Pac. R. R.* v. *Artist*, 60 Fed. Rep. 365 (8 U. S. Cir. Ct. App.).

In accordance with this view, it has been uniformly held, so far as we have been able to discover, that, having selected surgeons skilled and competent in their profession, the corporation has discharged every duty that humanity or sound morals impose, and that it is to no extent liable for the mistakes they may subsequently commit.

In the *South Florida Railway Co.* v. *Price*, 13 So. Rep., 638 (decided July, 1893), the declaration averred that the surgeon employed by the defendant to render surgical aid to its employes injured in its service, set the plaintiff's arm in an "unskilled and negligent manner," and that for this the corporation was liable. To this claim the Court says: "Even though we should admit it to be within the corporate powers of such a company to obligate itself to the rendition of medical or surgical aid to its sick or injured employes, by assuming it as a duty or otherwise, or to become liable under any circumstances for any negligence of any such surgeon acting in the line of his profession, still, it seems to be well settled that it will have performed its entire duty in that respect, when it employs a person of ordinary competency and skill in that profession, and that, having done so, it cannot be made liable for the carelessness or negligence of such surgeon in the performance of his duties as such."

In the *Union Pacific Railway Co.* v. *Artist*, 60 Fed. Rep., 365 (8 U. S. Cir. Ct. of App.), the facts were that each employe of the railroad was required to contribute out of his wages twenty-five cents a month, and the corporation, out of its general treasury, contributed from $2,000 to $4,000 per month to establish a hospital and employ physicians and surgeons for the care of its wounded and sick employes, without any charge to them or profit to the railway. On these facts, it was held that the

company was not liable for an injury to one of its employes from the malpractice of a surgeon doing service in the hospital. The Court says, through Judge Sanborn: "The result is, that the doctrine of *respondeat superior* has no application to this case. The only contract the law implies here is the agreement on the part of the company to use reasonable care to select and obtain skillful physicians and careful attendants; and, if the company performed that contract, it was responsible no further."

In accord with these are the cases of *Lautheim* v. *Netherland Steamship Co.*, 13 N. E. Rep., 781 (S. C., 107 N. Y., 228); *O'Brien* v. *Cunard*, 28 N. E. Rep., 266; *Secord* v. *Railway Co.*, 18 Fed. Rep., 221; *McDonald* v. *Mass. Gen. Hospital*, 120 Mass., 432, and *Richardson* v. *Carbon Hill Co.*, 20 L. R. A., 338.

We think the sanction of authority and of reason is with the ruling of the Circuit Judge on this point. Other objections have been disposed of orally. The judgment is affirmed.

*MENKEN v. BRINKLEY.

(*Jackson*. May 14, 1895.)

1. SPENDTHRIFT TRUSTS.

The case of Jourolmon v. Massengill, 86 Tenn., 81, determining that, under the Act of 1832 (Code, § 4283), one person may convey property in trust for the benefit of another, and so limit and restrict it as to exempt it from the debts of the beneficiary thereafter created, does not authorize the creation of such a trust by a person for his own benefit. (*Post, pp. 722–737.*)

Code construed: § 5026 (M. & V.); § 4283 (T. & S.).

Cases cited: Jourolmon v. Massengill, 86 Tenn., 81; Henson v. Wright, 88 Tenn., 501; Turley v. Massengill, 7 Lea, 353; Hooberry v. Harding, 10 Lea, 392; Hawkins v. Pearce, 11 Hum., 44; Mills v. Mills, 3 Head, 705; 91 U. S., 716; 111 U. S., 542.

2. SAME.

Such a trust cannot be created by a grantor, he being the only beneficiary, either by a direct exemption of the property from his future debts, or indirectly, by leaving it discretionary with the trustee to allow him benefits from the property. (*Post, pp. 728, 729.*)

3. JUDGMENTS BEFORE JUSTICES OF THE PEACE IN OTHER STATES, UNDER ART. IV., SEC. 1, OF CONSTITUTION OF THE UNITED STATES.

A judgment of a Justice of the Peace in another State falls within the provision of Art. IV., Sec. 1, of the Constitution of the United States, requiring each State to give full faith and credit to the judicial proceedings of every other State. (*Post, pp. 737, 738.*)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.

JOHN L. T. SNEED, J.

*Syllabus prepared by the Judge rendering the opinion.—REPORTER.

GEORGE E. NEWHARDT, THOMAS H. JACKSON, and JOHN H. WATKINS for Menken.

TURLEY & WRIGHT for Brinkley.

WM. M. SMITH, Sp. J. On December 10, 1887, Robert C. Brinkley, a young man of improvident and extravagant habits, executed a conveyance, by which he transferred a large amount of real estate therein described, part of which is in Shelby County, Tennessee, to his half brother, Hu. L. Brinkley, and his brother-in-law, C. C. Currier, upon certain trusts specifically defined and set out in said instrument.

As the contest in this cause is over this deed, it is necessary that its contents be stated, and it will perhaps be more satisfactory to set out the deed in full. It is as follows:

"This indenture, made between Robert C. Brinkley, party of the first part, and C. C. Currier and Hu. L. Brinkley, trustees, parties of the second part, witnesseth, that upon the trusts and for the purposes hereinafter set out, the party of the first part has bargained and sold, and by these presents does grant, bargain, sell, and convey, unto the parties of the second part, their heirs and assigns, as trustees, the following described real estate, situated in Shelby County, in the State of Tennessee, to wit: * * * To have and to hold, with all of the improvements and appurtenances, all of the real estate so hereinbefore described to the parties of the second part,

their heirs and assigns, in fee simple. And the party of the first part, for himself, his heirs and personal representatives, does hereby covenant with the parties of the second part, their heirs and assigns, that he will forever warrant and defend the title to the property so conveyed against the legal claims of all persons whomsoever.

"But this conveyance is made upon the trusts and conditions following: The party of the first part is now considerably in debt. It is not the purpose of the party of the first part to acknowledge hereby any specific debts, nor in any way to estop himself or the parties of the second part from contesting the validity of any claim that may be made, or from making any legal defense thereto, but it is desired that his just debts shall be paid out of the property hereby conveyed, or its proceeds, and the payment of such debts is one of the trusts and purposes of this conveyance. The property hereby conveyed is mostly unimproved and unproductive, and another purpose and trust is, that it may be improved, and provision made for the payment of the taxes, insurance, and other costs and expenses attaching to it. A further trust and purpose is, that the parties of the second part shall control, manage, protect, and preserve the property, and have full power and discretion to deal with it in all respects as to them may seem best for the efficient discharge of the trusts. Therefore, the parties of the second part are hereby vested with the absolute title to all

of said property, and with full power to sell and convey it, or any part of it, or to exchange it, or any part of it, for other property, in their own discretion, whenever and however they may deem best, and no purchaser from them is required to look to the application of the purchase money. Said parties of the second part are further clothed with full power and discretion to use any portion of said property, or the proceeds of any of it when sold, or any property acquired by exchange, or its proceeds, in improving other portions of the trust by erecting such buildings or making such other improvements as the parties of the second part may deem best, and also to use the same in paying the just debts of the party of the first part, and in reimbursing the parties of the second part for any advances made, and for paying debts which the parties of the second part may find it necessary or expedient to make, as trustees, upon the faith of the said property, or to incur and raise by mortgages or liens upon said property. The parties of the second part may also, in their discretion, make advances from said property, or its proceeds, from time to time as they may choose to do so, to the party of the first part, provided that they shall not, in any one year, advance or pay to him more than the sum of six hundred dollars, until the net annual income from said property shall amount to the sum of six hundred dollars per annum, and, if its net annual income shall ever exceed that amount,

then the parties of the second part may increase such advancements in their discretion. The discretion to make such advances or payments, whenever it may to them seem best, is not limited, however, to advances out of the income or profits of the property, but extends to the corpus or its proceeds.

"It is expressly hereby provided that the parties of the second part are to be under no obligation whatever to advance or pay to the party of the first part anything whatever out of said property or its proceeds, and that the party of the first part shall have no right to assert any claim therefor, nor to anticipate or alienate any claim therefor, nor in any way to interfere with the control or management of the said property, nor to incumber it. The power to sell and convey hereby conferred upon said trustees includes the power to mortgage for the purpose of the trusts; and the general scope of the powers shall include leasing, renting, insuring, paying taxes, and doing any and all things which said trustees shall consider proper. If at any time said trustees shall deem it advisable to advance their own money, or use their own credit in raising money, for the purposes of the trusts, the property held in trust shall be bound in their hands for such advances, or for debts or obligations so incurred. As compensation for services rendered in the execution of this trust, said trustees shall be entitled to, and may retain out of any moneys coming into their hands, a commission

of ten per cent. upon all the money that shall pass through their hands as such trustees. If they shall acquire other property by purchase or exchange, they will take title as trustees, subject to the trusts, powers, and discretions, and to all the provisions of this conveyance. This trust is to continue during the life of the party of the first part; but it is hereby expressly provided that the said trustees may, at any time after two years from the date hereof, at their discretion, and solely at their discretion, put an end to it by a reconveyance of their trust property to the party of the first part; and, also, that the said trustees may at any time, with the concurrence of the party of the first part, appoint some other person or persons as trustee or trustees, and convey the trust property to such person or persons, to be held under the trusts and provisions of this conveyance. Whenever there is more than one trustee, in the case of the death, resignation, or refusal to act of one, the trust shall survive and be exercised fully by the other.

"The party of the first part expressly reserves the power to appoint, by his last will and testament, the person or persons who shall take the property held under this trust at his death, and to provide for and control the destination of said property. In the event that he shall die without exercising this power of appointment, the property then held under this trust shall go, at his death, absolutely and in fee, under the laws of descent and distri-

bution of the State or States in which it shall be situate, as if he had owned it at the time of his death, and had died intestate in regard to it.

"It is hereby expressly provided that the said parties of the second part, or the survivor of them, or their successor or successors, shall not be required to execute any bond or other security as trustee or trustees under this conveyance.

"In witness whereof, the party of the first part does hereto set his hand and seal on this tenth day of December, 1887.

"ROBERT C. BRINKLEY (Seal)."

After the execution of this deed, R. C. Brinkley, the grantor, contracted other debts, which have been reduced to judgments at law against him, upon which executions have been returned unsatisfied, and, on July 11, 1893, the J. S. Menken Company, one of the judgment creditors, filed the original bill in this cause, claiming that said R. C. Brinkley has an equitable interest in the property conveyed, and seeking to subject it to the satisfaction of the judgment. Such proceedings were had that other judgment creditors of this State became parties complainant, and also several creditors with judgments rendered in California, to which State, it seems, Brinkley had removed.

The Chancellor's decree was in favor of all parties complainant, and subjected the property conveyed to the satisfaction of their debts. From this decree

H. L. Brinkley, the acting trustee (the other having resigned), alone appealed.

At the outset, it is proper to say that we do not think that it was the intention of the grantor in this deed to provide for the payment of debts which he might contract after its execution. On the contrary, his intention clearly was that the property conveyed should not be subjected to any debts thereafter created by him during the continuance of the trust.

This trust is what is denominated an active trust, conveying the legal title to the trustees, and imposing active duties on them to be performed. *Jourolmon* v. *Massengill*, 86 Tenn., 96–99; *Henson* v. *Wright*, 88 Tenn., 501. In this, as in all other trusts, there must be a *cestui que trust*, and it is evident that the grantor himself is the beneficiary. We cannot, therefore, yield to the ingenious argument of counsel for appellant that R. C. Brinkley, the grantor, has no interest in the trust property which he can enforce. If the trustee should claim the right to withhold all benefits from the grantor, there can be no doubt, the question of fraud out of the way, that the grantor could assert and maintain his rights in a Court of Equity. If the grantor in this deed reserves no rights to himself, it follows that it is a trust without a beneficiary, and the trustee becomes, in effect, the owner of the property conveyed. But we go further, and hold that, unless the owner of the property can convey it in trust,

and reserve to himself benefits directly, and, at the same time, exempt it from liability for his future debts, he cannot do so indirectly, by conferring discretion on the trustee to withhold all benefits from him; for, if this can be done, the owner need only select as trustee a near kinsman or tried friend, on whom he may rely for liberality, and thus indirectly accomplish what he cannot do directly.

Taking this view of this deed, it becomes necessary to determine whether the owner of property may convey it in trust, he himself being the *cestui que trust*, and exempt it from the payment of debts which he may thereafter contract.

Whether one person can convey property in trust for the benefit of another, who is *sui juris*, and so limit and restrict it as to shield it from the debts of the beneficiary, has been much discussed. The English Courts, as stated by this Court in *Journal-mon* v. *Massengill*, *supra*, hold that such exemption cannot be made, and most of the States of the Union have followed the English rule. Mr. Gray, Story Professor of Law in Harvard University, published, in 1883, a book on Restraint on Alienage of Property, in which he collated the decisions of the several States on these "spendthrift trusts," as they have been aptly termed. The result was that, up to that time, only two States, Pennsylvania and Massachusetts, held restraints on alienation and liability for debts valid. Gray on Restraint on Alienation, Sec. 175, *et seq.* To the authority of the

cases in these two States must be added the great weight of the Supreme Court of the United States. In the cases of *Nicholls* v. *Eaton*, 91 U. S., 716, and *Spindle* v. *Shreve*, 111 U. S., 542, the same doctrine is held.

Mr. Gray places Tennessee in the list of States which have followed the English rule, and held such trusts invalid in so far as they attempt to restrain alienations, either voluntary or *in invitum* by creditors. This he was authorized to do by the cases of *Turley* v. *Massengill*, 7 Lea, 353, and *Hooberry* v. *Harding*, 10 Lea, 392, which he cites. But the later case of *Jourolmon* v. *Massengill*, 86 Tenn., 81, overrules these two cases, and upholds these restraints in a trust created by one person for the benefit of another. The decision is based on the Act of 1832 (Code, § 4283; M. & V., § 5026). But it has been nowhere held that the owner of property may himself convey it in trust, he being the *cestui que trust*, and exempt it from liability for debts which he may create. And we think the section of the Code just referred to, in direct terms, gives the creditor, whose execution has been returned unsatisfied in whole or in part, the right to reach, in the Chancery Court, and subject to his judgment, property held in trust for his debtor, when the trust has been created by the debtor himself. The case of *Jourolmon* v. *Massengill*, *supra*, in construing this section, holds that such property cannot be reached when the trust has been created

by a person other than the debtor; and it just as clearly follows that it may be reached when the trust is created by the debtor himself. But, in the absence of a statute positively so directing, we could never hold that the owner of property can so convey it as to enjoy the benefits arising from it and shield it from debts which he may create, even if he be a spendthrift; and we have yet to learn that a spendthrift has rights superior to those of other people. If a spendthrift may do this thing, any other person can; and what would be the condition of society, commercially, if every man can make his neighbor his trustee to manage his property so that he may enjoy its benefits, and, at the same time, protect it from his debts, we will not endeavor to depict.

It is a general rule that all property to which a debtor has a right, may be subjected to his debts, unless the State shall see fit to exempt a portion of it. *Hawkins* v. *Pearce*, 11 Hum., 44.

As one of the counsel for complainants has well said, it is an elementary principle that a party *sui juris* cannot so convey his property as to enjoy the benefit of its income, and exempt it from his debts: See Tiedeman on Real Property, Sec. 503; 4 Kent Com., p. 311, note *a;* 2 Perry on Trusts, Sec. 555; 23 Am. & Eng. Ency. of Law, p. 10, and notes; *Harding* v. *St. Louis Life Insurance Co.*, 2 Tenn. Ch., 465; *Jourolmon* v. *Massengill*, 86 Tenn., 104, 105.

In Pennsylvania and Massachusetts, the decisions of which States it has already been said have been most favorable to spendthrift trusts, attempts have been made to uphold against creditors trusts like the one under consideration, but they have failed.

In *Mackason's Appeal*, 42 Penn. St., 330, decided in 1862, the Court say: "This statement brings us to the simple inquiry, can the owner of property so dispose of it for his own use, benefit, and support, as to put it beyond liability for his future debts, he being and continuing *sui juris*, and there appearing to be no reason except to withdraw it from such liability, and thus retain the temporal ownership without its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system, entirely destroy all faith in the apparent ownership of property, and repeal all our statutes and decisions against frauds. Every man about to engage in business, where there was a chance of loss, would place himself under the pupilage of trustees, and everybody's estate would be passing under settlement deeds and trustees' accounts, through the Courts, before, in the natural course of things, the jurisdiction of the orphan's Court would attach. Such consequences from judicial action need not be deprecated in advance, for they can never occur."

And in *Ghormley* v. *Smith*, 139 Penn. St., 584, it is said: "But whilst, in the recognition of spendthrift trusts, we have departed from the English

rule, there is no case in Pennsylvania which goes to the extent of recognizing a spendthrift trust, in which the grantor is himself the sole beneficiary for life, with power to dispose of the trust property at death, yet neither the income nor the *corpus* of the estate is subject to his debts. * * * The policy of our law is otherwise; and in *Mackason's Appeal* it has been plainly so decided." This case was decided in 1891. And in Massachusetts the decision is the same way. *Pacific Bank* v. *Windrom*, 133 Mass., 175. Nor do we think that the cases of *Ashhurst's Appeal*, 77 Penn. St., 464, and *Earp's Appeal*, 75 Penn. St., 119, are to the contrary. As we understand these cases, they only hold that such trusts are valid as between the grantor and grantee, and cannot be revoked by the grantor.

Counsel for appellant seem to shrink from arguing that the owner of property may convey it in trust and exempt it from debts thereafter created, reserving to himself a substantial benefit. They prefer to rely on the position that the grantor in this deed reserves no substantial interest in the property. This contention we have already noticed. They refer, however, to the case of *Mills* v. *Mills*, 3 Head, 705, as an authority to support the attempted exemption in this deed. The case cited is poorly reported, the reporter making no statement of facts at all, but referring to the opinion for the facts, and in the opinion we find no statement which shows, distinctly, the points at issue. It is true

the opinion shows there was a deed by the owner of the property conveying it to a trustee in trust to pay existing debts and to hold the residue for the support of the grantor and his family during the life of the grantor, with remainder at his death to his children. Here seems certainly an interest to the extent of his support, jointly with his family, reserved to the grantor, but the conveyance was for the benefit of the wife and children, with remainder to the children, and with a provision that the income of the property could only be subjected to such debts or contracts of the grantor as should be made for the necessary support of himself or his wife and children; and that the body of the fund, or the property purchased therewith (the trustee having power to invest the fund in other property, with other large powers), should not be subject to any debt thereafter made by the grantor, unless authorized by the trustee.

It is also said in the opinion "that the body of the property cannot be applied to any debt of the said James T." the grantor, "contracted after the making of the deed, being satisfied, as we are, that the trustee never, at any time, gave his sanction to any of said debts. Neither can the interest, rents, or hires be applied to any such debt, unless shown to be for the necessary support of the said James T., or his wife and children."

From this we may infer that debts were claimed in the suit. But, as the deed itself was a proper

deed, and free from fraud in so far as it provided for the support of the grantor's wife and children, and as the only interest reserved to the grantor was the right to a support for himself in connection with them, that is the only interest which his creditors possibly could have reached. And there is nothing in the opinion to show that judgment creditors with returns of executions unsatisfied, were seeking to ascertain and subject that interest.

On the contrary, if creditors were proceeding at all, it is evident that they were attempting to subject the entire body of the property, or the entire profits. We do not think, therefore, that this opinion can be taken as an authority to support the contention of appellant. And it may be observed that it might very well have been held in *Mills* v. *Mills* that the grantor had no separable interest in the property conveyed which could have been separated from that of his wife and children, the other beneficiaries, so as to be subjected to his debts, as was held in Virginia in *Markham* v. *Guerrant*, 4 Leigh, 279, and *Johnston* v. *Zane*, 11 Grat., 552. See Gray on Restraint on Alienation, Secs. 176 and 242–249. And it is significant that this case has not been cited in the opinions in any of the reported cases on this subject in this State.

It is also insisted for appellant that, by the reservation of the power to appoint by will the persons to whom the property shall go after the death of the grantor, R. C. Brinkley, and by the pro-

vision that, in case he fails to make an appointment, it shall go to the persons who would be entitled under the laws of descent and distribution, an interest in remainder is created, which at least cannot be subjected to the debts of the grantor. There is certainly no remainder in any appointee under a will, for a will may never be made, and, if made, could only take effect at the death of the testator, and then only upon the property remaining. And if Brinkley should die intestate, his property would descend to his heirs and distributees, whether the deed so provided or not. But, beyond this, there is a clause in the deed giving the trustees, after two years, the power to terminate the trust, and reconvey the property to Brinkley. This seems to us conclusive that no remainder interest was created, or intended to be created; and, even if there were a remainder, the rents and profits, or the property during Brinkley's life, could be subjected to his debts.

The complainants have prosecuted a cross-appeal from that part of the decree in which the Chancellor refused to set aside this deed. In this the decree is clearly correct. The deed is good, as between the grantor and the trustee, the grantee, as long as the trustee chooses to continue the trust. It is only invalid in so far as it attempts to shield the property from the creditors of the grantor. And the property is a trust fund in the hands of the trustee for the payment of the debts of the

grantor, whether contracted prior or subsequent to the execution of the deed of trust. *Mackason's Appeal*, 42 Pa. St., 330.

No question is made as to the validity of the debts of the Tennessee creditors, complainants in the cause. Having judgments and returns of *nulla bona*, they are clearly entitled to have their judgments satisfied, under Sec. 4083 (M. & V., 5026) of the Code. But there are several judgments rendered in California, two of which were before Justices of the Peace of that State, which are embraced in the Chancellor's decree.

No case in this State has been brought to our notice deciding that a judgment before a Justice of the Peace of another State falls within the provisions of Article IV., Section 1, of the Constitution of the United States, requiring each State to give full faith and credit to the judicial proceedings of every other State. But the current of authority is that way, and we now so determine. See 2 Black on Judgments, Secs. 934, 935; 12 Am. & Eng. Ency. of Law, p. 505, note 1. And the Code, § 3796 (M. & V., § 4549), provides a method for the authentication of such proceedings. The other California judgment is of a Court of Record.

There is no formal defense of *nul tiel record*, but various objections to the California records and proceedings are made, and assigned as error; and it is insisted that they are properly made under the agreement of counsel entered into before the hearing

of the case below. It may be that the objections might have been made below, under this agreement; but, if they were so made, and were acted on by the Chancellor, the record fails to show it, and they cannot be noticed now. If made there, the defects in the certifications of the proceedings, if they really exist, might have been remedied by leave to have them amended; and other difficulties, now suggested, might have been cured by proof. This Court will not put the Chancellor in error, if there really was error as to these objections, unless they were made before him, and acted on by him.

These California creditors are, therefore, entitled to relief under Section 4279 (M. & V., § 5040) of the Code, which is as follows: "When a judgment has been recovered in any other State against a resident of such State, and the creditor has exhausted his legal remedy, the real or personal property of the debtor in this State may be subjected to the satisfaction of such debt by bill, stating the facts under oath, and filed in the Courts of the district in which the property is situated."

The result is, that the decree of the Chancellor, subjecting the property conveyed by the trust deed to the satisfaction of the several judgments of complainants, is affirmed, and defendant, H. L. Brinkley, the trustee, will be directed to pay them out of the trust property.

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